



OFFICE OF THE POLICE COMMISSIONER

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July 6, 2012

Memorandum for: Deputy Commissioner, Trials

Re: **Captain Matthew Travaglia**
Tax Registry No. 903244
Patrol Borough Manhattan North
Disciplinary Case No. 85116/09

The above named member of the service appeared before Deputy Commissioner Martin G. Karopkin on June 7, 2011 and was charged with the following:

DISCIPLINARY CASE NO. 85116/09

1. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on or about and between May 1, 2008 and July 22, 2008, did wrongfully and without just cause engage in off-duty employment as an attorney without authority or permission to do so. (*As amended*)

P.G. 205-40, Page 1, Paragraph 1

OFF DUTY EMPLOYMENT

2. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on six (6) occasions; November 7, 2007, January 17, 2008, March 28, 2008, April 11, 2008, June 3, 2008, and July 22, 2008, while on duty, conducted personal business as an attorney.

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

3. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on six (6) occasions while assigned as the Commanding Officer of Patrol Borough Queens South; November 2, 2007, November 7, 2007, January 3, 2008, January 17, 2008, March 28, 2008, and April 11, 2008, failed to supervise officers under his command in that Captain Travaglia was conducting personal business while on-duty.

P.G. 202-09, Page 1, Paragraphs 1 and 2

COMMANDING OFFICER

4. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on two (2) occasions while assigned as the Executive Officer of the 113th Precinct; June 3, 2008 and July 22, 2008, failed to supervise and perform his duties in that Captain Travaglia was conducting personal business while on-duty, and on July 22, 2008, was outside of both his command and the five boroughs.

P.G. 202-10, Page 1, Paragraph 11

EXECUTIVE OFFICER

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

5. Said Captain Matthew Travaglia, assigned to the 113th Precinct, was off post on seven (7) occasions; November 2, 2007, for 3 hours, November 7, 2007 for 3 hours and 30 minutes, January 3, 2008 for 3 hours and 40 minutes, January 17, 2008 for 2 hours, January 25, 2008 for 20 minutes, June 3, 2008 for 30 minutes, and July 22, 2008 for 1 hour and 25 minutes. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

6. Said Captain Matthew Travaglia, assigned to the 113th Precinct, was off post on two (2) occasions; on March 28, 2008, Captain Travaglia was scheduled to perform an 11:00 am to 7:00 pm tour but was in Nassau County taking part in legal proceedings related to his law practice which started at approximately 10:47 am; on April 11, 2008, Captain Travaglia was scheduled to perform an 11:30 am to 7:30 pm tour but was in Nassau County taking part in two legal proceedings related to his law practice which started at approximately 10:04 am and 2:23 pm, and on both occasions he was outside of both his command and the five boroughs.

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

7. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on five (5) separate occasions on or about and between January 3, 2008, and July 9, 2008, used a Department vehicle for personal transportation.

P.G. 203-06, Page 1, Paragraph 15

PROHIBITED CONDUCT

8. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on or about November 7, 2007, having taken 2 hours of Lost Time, failed to submit a Lost Time form documenting the event.

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

9. Said Captain Matthew Travaglia, assigned to the 113th Precinct, on five (5) separate dates; November 2, 2007 (10 minutes), January 17, 2008 (2 hours), January 25, 2008 (20 minutes), June 3, 2008 (30 minutes), and July 22, 2008 (1 hour, 25 minutes), recorded earlier tour start times than actually worked, receiving approximately 4 hours and 25 minutes compensation which he was not entitled to. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

10. Said Captain Matthew Travaglia, on or about November 7, 2007, while assigned to Patrol Borough Queens South, failed to sign in at the start of his tour or out at the end of his tour in the Command Log as required. *(As amended and re-amended)*

P.G. 202-09, Page 3, Paragraph 26

COMMANDING OFFICER

11. On or about and between September 15, 2010 and June 30, 2011, Captain Matthew Travaglia, while assigned to the 113th Precinct, 105th Precinct, and subsequently Patrol Borough Manhattan North, wrongfully engaged in off-duty employment as an Assistant Adjunct Professor at Queens Borough Community College without authority or permission to do so. *(As amended)*

P.G. 205-40, Page 1, Paragraph 1

OFF DUTY EMPLOYMENT

12. On or about May 31, 2011, June 1, 2011, and June 2, 2011, Captain Matthew Travaglia improperly worked as an Assistant Adjunct Professor while off-duty and within the 3 hours prior to his regular tour of duty. *(As amended)*

P.G. 205-40, Page 6,

**GENERAL PROHIBITIONS (C) (5) – OFF DUTY
EMPLOYMENT**

13. On or about July 5, 2011, Captain Matthew Travaglia, during an official Department interview conducted pursuant to P.G. 206-13 and P.G. 203-08, provided false and or misleading statements to Department investigators when questioned about the facts and circumstances surrounding his off-duty employment applications and the disapproval or revocation of said applications. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

14. On or about July 5, 2011, Captain Matthew Travaglia, wrongfully impeded a Department investigation in that Captain Travaglia provided false and or misleading statements during his official Department interview conducted on July 5, 2011, necessitating further investigative steps be taken by Department investigators. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5

PROHIBITED CONDUCT

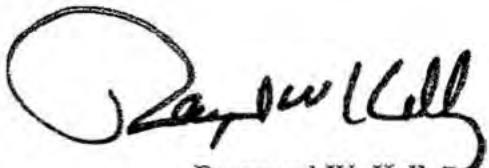
15. Said Captain Matthew Travaglia, after having been instructed by his Commanding Officer, Inspector Kristel Johnson, on or about September 15, 2010, and September 17, 2010, that his off-duty employment privileges were revoked and or disapproved, failed to comply in that he continued his off-duty employment. *(As amended)*

P.G. 203-03, Page 1, Paragraph 2

COMPLIANCE WITH ORDERS

In a Memorandum dated January 17, 2012, Deputy Commissioner Martin G. Karopkin found the Respondent Guilty of Specification Nos. 1, 7, 11, and 12, Guilty in Part of Specification Nos. 3, 4, 5 and 9, Not Guilty of Specification Nos. 2, 6, 8, 10, 13 and 14, and Specification No. 15 is dismissed, in Disciplinary Case No. 85116/09. Having read the Memorandum and analyzed the facts of these instant matters, I approve the findings, but disapprove the penalty.

The overall nature of the misconduct committed by the Respondent, who is a ranking officer, warrants a more significant penalty. Therefore, the Respondent is to forfeit forty (40) Vacation days, as a disciplinary penalty.



Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

*The
City
of
New York*

January 17, 2012

MEMORANDUM FOR: Police Commissioner

Re: Captain Matthew Travaglia
Tax Registry No. 903244
Patrol Borough Manhattan North
Disciplinary Case No. 85116/09

The above-named member of the Department appeared before Assistant Deputy Commissioner John Grappone on June 7, 2011, July 22, 2011, August 2, 2011, and August 3, 2011. He appeared before me on September 22, 2011, December 1, and December 7, charged with the following:

1. Said Captain Matthew Travaglia, assigned to 113 Precinct, on or about and between May 1, 2008, and July 22, 2008, did wrongfully and without just cause engage in off-duty employment as an attorney without authority or permission to do so. (*As amended*)

P.G. 205-40, Page 1, Paragraph 1 – OFF DUTY EMPLOYMENT

2. Said Captain Matthew Travaglia, assigned to 113 Precinct, on six (6) occasions; November 7, 2007, January 17, 2008, March 28, 2008, April 11, 2008, June 3, 2008, and July 22, 2008, while on-duty, conducted personal business as an attorney.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

3. Said Captain Matthew Travaglia, assigned to 113 Precinct, on six (6) occasions while assigned as the Commanding Officer of Patrol Borough Queens South; November 2, 2007, November 7, 2007, January 3, 2008, January 17, 2008, March 28, 2008, and April 11, 2008, failed to supervise officers under his command in that Captain Travaglia was conducting personal business while on-duty.

P.G. 202-09, Page 1, Paragraph 1 and 2 – COMMANDING OFFICER

COURTESY • PROFESSIONALISM • RESPECT

4. Said Captain Matthew Travaglia, assigned to 113 Precinct, on two (2) occasions while assigned as the Executive Officer of the 113 Precinct; June 3, 2008 and July 22, 2008, failed to supervise and perform his duties in that Captain Travaglia was conducting personal business while on-duty, and on July 22, 2008, was outside of both his command and the five boroughs.

P.G. 202-10, Page 1, Paragraph 11– EXECUTIVE OFFICER
P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

5. Said Captain Matthew Travaglia, assigned to 113 Precinct, was off post on seven (7) occasions; November 2, 2007 for 3 hours, November 7, 2007 for 3 hours and 30 minutes, January 3, 2008 for 3 hours and 40 minutes, January 17, 2008 for 2 hours, January 25, 2008 for 20 minutes, June 3, 2008 for 30 minutes, and July 22, 2008 for 1 hours and 25 minutes. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

6. Said Captain Matthew Travaglia, assigned to 113 Precinct, was off post on two (2) occasions; on March 28, 2008, Captain Travaglia was scheduled to perform an 11:00 am to 7:00 pm tour but was in Nassau County taking part in legal proceedings related to his law practice which started at approximately 10:47 am; on April 11, 2008, Captain Travaglia was scheduled to perform an 11:30 am to 7:30 pm tour but was in Nassau County taking part in two legal proceedings related to his law practice which started at approximately 10:04 am and 2:23 pm, and on both occasions he was outside of both his command and the five boroughs.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

7. Said Captain Matthew Travaglia, assigned to 113 Precinct, on five (5) separate occasions on or about and between January 3, 2008, and July 9, 2008, used a Department vehicle for personal transportation.

P.G. 203-06, Page 1, Paragraph 15 PROHIBITED CONDUCT

8. Said Captain Matthew Travaglia, assigned to 113 Precinct, on or about November 7, 2007, having taken 2 hours of Lost Time, failed to submit a Lost Time form documenting the event.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

9. Said Captain Matthew Travaglia, assigned to 113 Precinct, on five (5) separate dates; November 2, 2007 (10 minutes), January 17, 2008 (2 hours), January 25, 2008 (20 minutes), June 3, 2008 (30 minutes), and July 22, 2008 (1 hours, 25 minutes), recorded earlier tour start times than actually worked, receiving approximately 4 hours and 25 minutes compensation which he was not entitled to. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

10. Said Captain Matthew Travaglia, on or about November 7, 2007, while assigned to Patrol Borough Queens South, failed to sign in at the start of his tour or out at the end of his tour in the Command Log as required. (*As amended and re-amended*)¹

P.G. 202-09, Page 3, Paragraph 26 – COMMANDING OFFICER

11. On or about and between September 15, 2010 and June 30, 2011, Captain Matthew Travaglia, while assigned to the 113th precinct, 105th precinct, and subsequently Patrol Borough Manhattan North, wrongfully engaged in off-duty employment as an Assistant Adjunct Professor at Queens Borough Community College without authority or permission to do so. (*As amended*)

P.G. 205-40, Page 1, Paragraph 1 OFF DUTY EMPLOYMENT

12. On or about May 31, 2011, June 1, 2011, and June 2, 2011, Captain Matthew Travaglia improperly worked as an Assistant Adjunct Professor while off-duty and within the 3 hours prior to his regular tour of duty. (*As amended*)

P.G. 205-40, Page 6, GENERAL PROHIBITIONS (C) (5) OFF DUTY EMPLOYMENT

13. On or about July 5, 2011, Captain Matthew Travaglia, during an official Department interview conducted pursuant to P.G. 206-13 and P.G. 203-08, provided false and or misleading statements to Department investigators when questioned about the facts and circumstances surrounding his off-duty employment applications and the disapproval or revocation of said applications. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

14. On or about July 5, 2011, Captain Matthew Travaglia, wrongfully impeded a Department investigation in that Captain Travaglia provided false and or misleading statements during his official Department interview conducted on July 5, 2011, necessitating further investigative steps be taken by Department investigators. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

15. Captain Matthew Travaglia, after having been instructed by his Commanding Officer, Inspector Kristel Johnson, on or about September 15, 2010, and September 17, 2010, that his off-duty employment privileges were revoked and or disapproved, failed to comply in that he continued his off-duty employment. (*As amended*)

P.G. 203-03, Page 1, Paragraph 2 COMPLIANCE WITH ORDERS

¹ This specification was re-amended orally on December 7, 2011.

The Department was represented by Daniel Maurer, Esq., Department Advocate's Office, and Respondent was represented by Louis La Pietra, Esq.

A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent, having pled Guilty, is found Guilty with respect to Specification Nos. 1, 7, 11 and 12. Respondent is found Guilty in Part with respect to Specification Nos. 3, 4, 5 and 9. Respondent is found Not Guilty with respect to Specification Nos. 2, 6, 8, 10, 13 and 14. Specification No. 15 is dismissed.²

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Martin Bailey, Tina Lehman, Melissa Sellers, Lieutenant John Crisalli, Courtney Jordan, Donna DeMatteo, Sergeant Wayne Chu, and Inspector Kristel Johnson.

Sergeant Martin Bailey³

Bailey, a member of the Department for 23 years, worked in Internal Affairs Bureau (IAB) Group One for six years. In April 2007, he was assigned to investigate

² A more detailed breakdown of the specifications by dates and issues will be found in the Penalty section of this decision.

³ Because Bailey's testimony covers so many dates and topics, it has been rearranged to bring together statements Bailey made both on direct and cross-examination by subject.

Respondent an anonymous letter sent to IAB indicating that Respondent was "working as a lawyer while on duty."

Pursuant to his investigation, Bailey learned that Respondent did not have an Off Duty Employment Application on file. However, there were previous Off Duty Employment Applications on file that had been approved and authorized for Respondent to obtain employment at various law firms. As part of his investigation, Bailey also obtained Respondent's Command Log entries, Night Shift Differential Requests [Department's Exhibit (DX) 1, blank form], and Employee Time Records, payroll records, Off Duty Employment Applications, E-ZPass records and Department phone records. Bailey defined a night shift differential as getting extra income from 1600 hours and 0800 hours on the following day. A Night Shift Differential Request is submitted once a month and lists all the days a member of the service has incurred night shift differential.

During the course of the investigation, Bailey and his fellow investigators would wait for Respondent to leave his house in the morning and follow him throughout the day. Both Respondent's residence and law firm are located in [REDACTED] County. Respondent's residence is in [REDACTED] and his office is across from the [REDACTED]

[REDACTED] He ascertained that Respondent's practice involved workers' compensation law and that there is Workers' Compensation Board location in [REDACTED] County.

On cross-examination, Bailey stated there was an Off Duty Employment Application on file that allowed Respondent to practice as an attorney, but the application

was expired⁴. According to Bailey, Night Shift Differential Requests should be submitted to the commanding officer at the end of the month. However, Bailey did not know if this is required by the Patrol Guide.⁵

Regarding November 7, 2007:

According to the borough roll call, Respondent was scheduled to work from 1700 to 0100 hours. At the time, Respondent was assigned as the commanding officer of Patrol Borough Queens South Anti-Crime. Commanding officers have to submit their weekly tours to the borough chief in advance. In addition, commanding officers can also change their tour during the week, but with the permission of the borough chief. Bailey said that his team would sometimes receive the amendments to the commanding officers' tours. Bailey testified that the Respondent's previous Off Duty Employment Application had expired.

Bailey and another investigator arrived at Respondent's home at 0800 hours and observed Respondent leave his residence at approximately 1040 hours. Bailey lost track of Respondent's personal vehicle and headed to Respondent's law office where he saw Respondent's vehicle parked on the third or fourth level of the parking deck, so Bailey said "we stayed there all day." At 1717 hours, Respondent came running out of the building and then went back to his residence. By 2030 hours, Respondent still had not left his residence and Bailey ended the surveillance.

⁴ At the time Bailey testified, it was believed that Respondent's authorization for off-duty employment had expired on November 7, 2007. It was later learned that it did not expire until May 1, 2008. The error was subsequently corrected and Specification No. 1 was amended.

⁵ Although this is actually stated in Administrative Guide Procedure No. 324-02 (effective June 1, 2005), Night Shift Differential forms are no longer used due to the implementation of the CityTime payroll system in March 2011.

According to Respondent's Night Shift Differential Request (DX 2), he worked from 1700 to 2300 hours that day. This meant that the Respondent took lost time for the remainder of his tour, from 2300 to 0100 hours. However, there was no Leave of Absence Report submitted. The Respondent did not sign in or out of the Command Log for that day. Bailey clarified that Respondent did not go to work that day before 2030 hours. Bailey also noted that after he left the law office, Respondent made one phone call to the command which lasted 21 minutes.

On cross-examination, Bailey said two cars were utilized in the surveillance. One car was driven by Bailey and the other car was driven by Sergeant Mulvihill. Bailey said Respondent went to the "law office -- he was working for...Agruso and Trovato." Bailey parked his vehicle on the top floor of the parking lot and waited for Respondent to return. Bailey neither went into the law office nor did he actually see Respondent working. At 1717 hours, Bailey observed Respondent "running out." Bailey then saw Respondent again at his home's driveway at 1745 hours. Five minutes later, Respondent's wife pulled into the driveway in her car.

Bailey stated that according to his investigation, he determined that Respondent was working from Respondent's law office and not from home. Bailey said that in Respondent's official Department interview, Respondent stated he was running because his wife was sick. Neither Bailey nor Mulvihill went to Respondent's command on that date.

On re-direct examination, Bailey testified that the building that Respondent went into does not have a Department facility. Bailey also stated that the Respondent's wife did not appear to be sick.

Regarding January 17, 2008:

Respondent was scheduled to work from 1700 to 0100 hours. However, according to his Night Shift Differential Report (DX 3), Respondent worked from 1630 to 0030 hours. However, according to the Command Log [Court Exhibit (CX) 3], Respondent signed in at 1745 hours. Bailey arrived at Respondent's residence at 1525 hours but did not see the Respondent's personal or Department vehicle. Bailey then went to Respondent's law office where Bailey observed Respondent's personal vehicle. Respondent left his law office at 1805 hours and arrived at his command at 1830 hours.

Bailey testified that Respondent's Department cell phone records for that date indicated that Respondent made a conference call to Patrol Borough Queens South from his law office at 1604 hours which lasted for two minutes. Respondent put himself present for duty at 1745 hours, but according to Bailey, the Respondent actually left his law office at 1805 hours and arrived at his command at 1830 hours. Bailey testified that Respondent had stated during his official Department interview that he had made the conference call from the office of an attorney at the location.

On cross examination, Bailey said that at 1805 hours, he had not seen Respondent, but only saw his vehicle. Bailey acknowledged that at 1925 hours, he saw a "male white" wearing a raid jacket that appeared to be Respondent in Respondent's command. Bailey was not aware of the significance of the Command Log entry that showed that Respondent left the command at 1940 hours to go to Lenox Hill [Hospital] and also an address on Matthews Avenue in the Bronx. In the course of his investigation, Bailey never learned that Respondent was the nephew and caretaker of a former Chief of

Personnel, who lived in the Bronx. He had no reason to believe that Respondent did not have permission or authority to do that.

On re-direct examination, Bailey said that Respondent made a conference call at 1600 hours via his Department-issued phone. The conference call was documented in the Command Log.

Regarding January 25, 2008:

According to the borough roll call, Respondent's scheduled tour was from 1000 to 1800 hours. However, Respondent's tour of duty, according to his Night Shift Differential Request (DX 3), was 1100 to 1900 hours. The Command Log (DX 19) showed that Respondent had signed in at 1055 hours.

On this date, Bailey arrived at Respondent's residence at 0900 hours and saw that Respondent's personal vehicle was not there but his Department car was. Respondent left his residence at 1020 hours in his Department vehicle. Bailey followed him briefly but lost track of him. Bailey then went to Respondent's law office and Bailey's partner, Sergeant Wayne Chu, went to Respondent's command. Chu waited at the Respondent's command until 1120 hours and then took a bathroom break. Chu returned at 1145 hours and saw Respondent's Department vehicle parked at his command. Bailey stated that from 1055 to 1120 hours, Respondent's assigned post was Patrol Borough Queens South. The Respondent however, was not on post during that time.

On cross-examination, Bailey did not know if Respondent called his command from an outside wire. He said that usually a call from an outside wire is documented in the Command Log, but Bailey did not review the Command Log for that particular day.

Regarding March 28, 2008:

According to his Night Shift Differential Request (DX 4), Respondent worked from 1100 to 1900 hours, and the Command Log showed that Respondent signed in at 1100 hours and signed out at 1920 hours.

Bailey had learned that Respondent was working as a workers' compensation attorney on this date when Bailey contacted the Office of the Inspector General of the Workers' Compensation Board and submitted to them ten random dates that Respondent worked the "day shift." Out of the ten dates submitted, Respondent represented clients at the Workers' Compensation Board on three of those dates; March 28, 2008, April 11, 2008, and June 3, 2008.

According to the Workers' Compensation Board, Respondent had two cases on the board's calendar, the first was at 0900 hours (which was called at 1054 hours) and the second case was at 1030 hours (which was called at 1047 hours). According to Bailey, it was "impossible" for Respondent to be representing someone at 1054 hours in Nassau County, then sign in the Command Log at 1100 hours. He said it would have taken the Respondent one-half hour to travel from Nassau County to his command at Patrol Borough Queens South.

On cross-examination, Bailey acknowledged that Respondent was at the Workers' Compensation Board and had two cases on the calendar. Bailey learned of the two cases from the Office of the Inspector General of the Workers' Compensation Board via telephone conversation. There was no surveillance conducted on that day. Bailey did not know when Respondent physically got to his command. According to his Night Shift Differential Request, Respondent worked from 1100 to 1900 hours, with the Command

Log indicating the same start time and Respondent signing out at 1920 hours.

Respondent did not submit an overtime slip for the additional 20 minutes. Bailey did not know the distance from the Workers' Compensation Board to the Respondent's command.

On re-direct examination, Bailey testified that on Respondent's last case was called at 1054 hours but he did not know when the case ended. Respondent signed in the Command Log at 1100 hours.

Regarding April 11, 2008:

Respondent was scheduled to work from 1130 to 1930 hours and the Command Log (DX 21) and Night Shift Differential Request (DX 5) entries are consistent with this. However, according to the Office of the Inspector General of the Workers' Compensation Board, Respondent represented clients in three cases in Nassau County that day. The first case was scheduled for 0900 hours (which started at 1004 hours) and the second and third cases were scheduled for 1330 hours (which started at 1423 hours). Bailey added that he did not know what time the latter cases ended.

On cross-examination, Bailey said no surveillance was conducted on this date. Bailey said Respondent had three Workers' Compensation Board cases with two clients on the calendar, and the second case was called at 1423 hours. Respondent was scheduled to work from 1130 to 1830 hours⁶. Bailey did not recall if this second case was done via telephone or if Respondent took a lunch break or left the command and went to do the case and came back. In addition, Bailey said, other than the report from the Inspector General of the Workers' Compensation Board, he did not have evidence

⁶ As recorded in transcript, should be 1930 hours.

that placed Respondent at the Workers' Compensation Board at the time the second case was called.

On re-direct examination, Bailey averred that if Respondent had visited the Workers' Compensation Board during his meal break, then Respondent would be off-post and conducting personal business on job time. Bailey stated that if the duty captain is required to go outside of the five boroughs, he has to notify Operations and the borough. However, Bailey never called the borough to verify if the Respondent had called.

Regarding June 3, 2008:

According to the borough roll call, Respondent's scheduled tour of duty was from 1500 to 2300 hours, but his Night Shift Differential Request (DX 6) and Command Log (DX 22) entries reflect that Respondent worked from 1415 to 2215 hours. On that day, Bailey and his partner arrived at the Respondent's home at 0700 hours. Bailey said the Respondent's personal vehicle left the residence at 0850 hours and arrived at the Workers' Compensation Board in Nassau County at 0925 hours. Respondent had one case that was supposed to start at 1300 hours, but was actually called at 1345 hours. The Respondent left the location at 1415 hours and was on the highway driving towards New York City at 1445 hours. Bailey said that, on that particular day, it took the Respondent one-half hour to drive from the Workers' Compensation Board to the highway.

On cross-examination, Bailey said Respondent was under surveillance on this date. Respondent's case was called at 1335 hours, and the Respondent was observed leaving the Workers' Compensation Board at 1415 hours. Bailey asserted that the Respondent was running 35 minutes late for his job with the Department.

Regarding July 22, 2008:

Respondent was assigned as the evening duty captain and was scheduled to work from 1500 to 2300 hours and his Night Shift Differential Request (DX 7) reflected this tour. On this day, Bailey arrived at the Respondent's residence at 0715 hours to conduct surveillance. At 0915 hours, the Respondent went to the Workers' Compensation Board, and then to his law office at 1205 hours. The Respondent left his law office at 1452 hours and, at 1500 hours, arrived at the [REDACTED] (also in [REDACTED] County) home of Lieutenant Person E [REDACTED] then on terminal leave⁷. Respondent left Person E [REDACTED] residence at 1600 hours and arrived at his command at 1625 hours. Bailey said Respondent and Person E used to work together at the 113 Precinct.

On cross-examination, Bailey acknowledged that Person E was not on terminal leave but, rather, he was on "leave pre-separation, disability." Bailey acknowledged he did not call Patrol Borough Queens South to ascertain whether the Respondent responded to Person E [REDACTED] address in response to a "call out." Bailey also did not ascertain if there was an occurrence at Person E [REDACTED] address that would necessitate the presence of the duty captain. Further, Bailey agreed that a duty captain is allowed to leave the confines of the five boroughs if the duty captain is investigating a situation involving a Department member.

Although Bailey did not call Patrol Borough Queens South, he said he checked the IAPro⁸ logs. However, he did not make a worksheet regarding his review of the IAPro logs. Bailey did not know why Respondent was at Person E [REDACTED] residence, nor did Bailey ever question Person E [REDACTED] as to why Respondent was there.

⁷ Leave accrued by uniformed members of the service at the rate of three days per year of service, intended to be used immediately prior to retirement.

⁸ IAB computer database.

On re-direct examination, Bailey said he observed Respondent leaving the Nassau County office dressed in business attire. Bailey said that either he or his partner called the law firm where the Respondent was working and set up appointments to specifically meet with the Respondent.

On re-cross examination, Bailey stated that he did not conduct any investigation as to whether there were any Department facilities in Nassau County. Bailey also said he did not conduct any investigation into the type of conference calls that require a person to call a "1-800" number to obtain a personal identification number (PIN). He acknowledged that captains often wear suits and carry files with them.

Tina Lehman

Lehman is a court reporter with the Workers' Compensation Board and knows Respondent as an attorney who appeared there. She was at work on March 28, 2008 and she had reviewed her records and determined that Respondent had appeared that day. Looking at her calendar for that date (DX 8), she indicated that Respondent appeared on the case of [REDACTED] (DX 9, hearing transcript). Lehman testified that the [REDACTED] case was called at 1047 hours and concluded at 1050 hours. She had determined the time, she said, through her software. She did not actually recall seeing Respondent there that day.

Lehman also indicated that there are times she creates a record after a case is called. She noted that this could occur when she is not in the room when the case is discussed. Then, she said, when she would get back the judge would tell her what action

was taken and she would note it. She said it would appear as the judge "speaking in colloquy."

Lehman believed that Respondent worked for the firm of Agruso and Trovato that day. She noted that the Workers' Compensation Board where she works is on the 7th floor of 175 Fulton Avenue in Hempstead.

On cross-examination, Lehman agreed that only way she knew the case had been called at 1047 hours was based on her computer. She explained that older machines wrote on paper but that it is now computerized and on a disk. She agreed that she had been asked to obtain the information about the case as a result of receiving an email from her supervisor and that she had responded by email. She testified that, initially, the time was an hour off because she forgot to change her machine for daylight savings time and that two email responses were sent. She believed the first email said the case had been called at 0947 hours but, subsequently, she went to the beginning of the day and saw that it was at 0800 hours which was an hour before they start.

She agreed that the calendar for the day lists the times that cases are scheduled for and not necessarily when they are actually called. She agreed that the transcript was relatively short and the case took only a short time, perhaps two or three minutes of talking.

With regard to her machine, she did not believe it had ever been maintained. She agreed that adjusting for daylight savings time had to be done manually. She agreed that the machine does not automatically set the time like a cell phone or a television box and that she could have put whatever time she liked into the machine. She did not know the accuracy of the machine. She agreed that it could be off and she would not know.

She also agreed that, once the record is closed in a case, the attorney usually leaves, unless he has another case on the calendar.

On re-direct examination, Lehman agreed that if parties had a conversation off the record before or after the case was called, she would not have a record of it.

Melissa Sellers

Sellers is a court reporter with the Workers' Compensation Board and knows Respondent as an attorney who appears there. She was asked to produce documents regarding April 11, 2008, and her calendar for that day (DX 10) reflected that Respondent was present. He signed in for the firm of Agruso and Trovato on the cases of Person D (DX 11, hearing transcript). These two cases were scheduled to be called at 1330 hours. Her stenographic notes indicated that the cases were called at 1423 and were concluded at 1425 hours. These time notations were generated, she said, by her stenographic machine. She said that her calendar indicated that Person D was present, as was the insurance carrier's attorney, Wilford. She had no independent recollection of Respondent being present that day.

On cross-examination, Sellers agreed that, based her notations on the calendar, it would be fair to say that Respondent was not there but that the judge had told her that he was going to be the attorney on the case. She agreed that it was possible that an attorney would not show up on a case. Sellers agreed that Respondent did not appear in the transcript and that, essentially, it was the judge talking about the case. She also agreed that it was possible for an attorney to be present for the purpose of the coversheet (calendar) but not be present in the hearing room for a proceeding such as the one

recorded in the transcript of this case. Sellers also agreed that she has seen instances where an attorney settles a case, has an off-the-record discussion with the judge, leaves, and the judge makes a record in the case.

On further examination, Sellers indicated that the "P" notation on her calendar for "present" could have been made because she saw the attorney or someone told her that attorney was present.

Lieutenant John Crisalli

Crisalli, who works for IAB, testified that he is familiar with the investigation into Respondent. He did not participate in the investigation, which was handled by a different team and he did not recall supervising it at any time.

He indicated that during the course of this trial, he was asked to do a computer check regarding Respondent, Person E and another member of the service from the 113 Precinct. He did a check for the period from July 22, 2008 through August 1 or 2, 2008. He said numerous logs turned up on all three names but that there was no log where Respondent was the reporter against either of the other two.

Crisalli was asked about the procedure for participating in a conference call and he indicated that he did not know anything about that. He did, however, speak to his supervisor, who told him that there was an 800 number which enabled someone to call into a teleconference with a chief or with the borough.

On cross-examination, Crisalli agreed that he did an IAPro check on or about July 14, 2011. He said his check was not part of the original investigation. Crisalli agreed that it would surprise him to learn that Bailey never conducted such a check as part of his

investigation; that Bailey never checked the borough to see if there had been a duty captain job for July 22, 2008; or that Bailey never called the Medical Division to see if Respondent had called about an issue on that date.

Courtney Jordan

Jordan is a stenographer for the Workers' Compensation Board and is familiar with Respondent, who has appeared there. Looking at her calendar (DX 12) and hearing transcript (DX 13) for March 28, 2008, she determined that Respondent appeared that day on the case of **Person A**. Looking at the calendar, she determined that Respondent did not appear by telephone.

Jordan indicated that, at that time in 2008, she did not have to list a time a case was called. If that were requested, she would have to look it up in her machine. Since then, the time is generated once a disk is put in the machine to transcribe the start of the case.

The **Person A** case was scheduled to be called at 0900 hours but it started at 1054 hours and ended at 1058 hours. At that point, it was noted by the Court (Grappone) that the times listed were 2254 and 2258 hours. Jordan replied that this was military time. Jordan responded, "Well, it is the evening but I didn't set it back. These are correct times but it does say p.m. but it is a.m. on my machine then." Jordan said she set the time on her machine using the computer at work, and the computer's clock was off by 12 hours. The proceeding could not have taken place at night because she does not work then.

On cross-examination, Jordan explained that, until approximately a year ago, stenographers were not required to record on transcripts the start and end times of a

proceeding. The times always appeared, though, on the disk versions. Although records show that Respondent was present in court on March 28, 2008, Jordan did not have any independent recollection of it.

On further examination, she testified that she did not know how her computer came up with the mistaken time of 2254 hours. It probably stemmed from her failure to specify a.m. or p.m. when she calibrated her machine. On recross examination, she stated that she learned military time from her husband.

Donna DeMatteo

DeMatteo is a court reporter with the Workers' Compensation Board in Nassau County and she knows Respondent as an attorney. DeMatteo worked on April 11, 2008. Her calendar for that day (DX 14) indicated that Respondent was present for the case of Person B scheduled for 0900 hours, and the case of Person C [redacted] scheduled for 1000 hours. Her notes indicated that the Person B case was called at 1004 hours and concluded at 1018 hours. These times were derived from her computer. She did not know how the machine knows the time; she said it was simply there. She then indicated that she sets the time. She did not set it on April 11, 2008, and she did not recall the last time she set or calibrated it.

Reviewing Person B's hearing transcript that she prepared (DX 15), and in response to a question from the Advocate, DeMatteo stated that Respondent appeared "in the case of [redacted]." ⁹ The case lasted 14 minutes, she said.

⁹ An examination of DX 15 indicates that Mildred Zilko was the WCB Judge. The claimant was Person B

DeMatteo also worked on June 3, 2008. According to her calendar for that date (DX 16), Respondent appeared before the board that day on the case of [REDACTED]. This was on the afternoon calendar, she said, starting at 1300 hours. According to her machine, the case started at 1334 and ended at 1347 hours. Reviewing the hearing transcript she prepared of that case (DX 17) Respondent, she said made a record in the case.

On cross-examination, she agreed that the time in the stenographic machine was set manually. She also noted that it was not the practice to put the time on the transcript when these cases were done then, but it is now.

Sergeant Wayne Chu

Chu, a 15-year member of the Department currently assigned to IAB, investigated Respondent's alleged off-duty employment at Queensborough Community College. While Respondent's personnel profile report indicated that his application for off-duty employment at the college had been disapproved, the college website listed him as an Assistant Adjunct Professor for Criminal Justice. The website showed him as teaching a course on corrections and sentencing in the Fall 2011, Spring 2011, and Summer 2011 school terms.

[DX 18A contains Respondent's renewal Off Duty Employment Application to be a self-employed attorney. It was signed by Respondent on August 16, 2010, approved by his commanding officer the next day, and approved by the Employee Management Division on September 9, 2010. The exhibit also contains a memorandum requesting the revocation of the application pending the resolution of the charges that were preferred against Respondent. The memorandum, signed by the commanding officer of IAB's

Special Investigations Unit and dated August 31, 2010, was approved by the Police Commissioner in September 7, 2010. A follow-up memorandum from the Personnel Records Section to Respondent's commanding officer states that the revocation of Respondent's off-duty employment approval was revoked effective immediately. This memorandum was dated September 15, 2010.

DX 18B is Respondent's Off Duty Employment Application to be an adjunct professor at Queensborough Community College. It was signed by Respondent on August 16, 2010 and approved by his commanding officer the next day, but it was ultimately disapproved by the Employee Management Division on September 17, 2010. On that date, a memorandum about the disapproval was generated by the Personnel Records Section for Respondent's commanding officer.]

In a July 5, 2011, official Department interview, Respondent stated that he first learned in an informal conversation with a chief in August 2010 that it looked like his law practice was going to be terminated. The revocation of his authorization to practice law was subsequently confirmed in a telephone conversation from his commanding officer Inspector Kristel Johnson. As for the disapproval of his application to teach at the college, Respondent indicated in the interview that he was never notified of his authorization status.

In a July 14, 2011, "informal conversation over the telephone," Johnson told Chu that she recalled receiving two memoranda days apart, one pertaining to Respondent's law practice application and another pertaining to his application to teach. Johnson told Chu that she notified Respondent of his authorization status on separate occasions in what she believed were face-to-face encounters.

On cross-examination, Chu testified that he believed it was Johnson who signed the commanding officer's approval section on Respondent's two off-duty employment applications. Chu did not know exactly when Johnson received the memoranda from the Personnel Records Section about the outcomes of the applications.

Respondent acknowledged in his official Department interview that he did not receive an approved copy of his Off Duty Employment Application pertaining to Queensborough Community College. Respondent explained to Chu that even though he did not receive this written approval of his application, he proceeded to teach at the college due to economic necessity. Other than his telephone conversation with Johnson, Chu did not take any steps to determine whether or not Respondent received any verbal notification about his application. During that conversation, Johnson told Chu that she received the Personnel Records Section memorandum about Respondent's law practice days before she received the memorandum about Respondent's teaching position. Johnson gave Respondent face-to-face notifications about the memoranda while at work, but she could not recall exactly when those notifications occurred. Chu never asked Johnson exactly where the notifications took place.

Inspector Kristel Johnson.

Johnson, a 26-year member of the Department currently assigned to Housing Borough Manhattan, was Respondent's commanding officer in September 2010. During that month, she received two Department memoranda with respect to Respondent's off-duty employment. At some point after September 15, she received the memorandum regarding the revocation of Respondent's authorization to practice law. She proceeded to

call Respondent on his cell phone and inform him of the revocation. In a subsequent face-to-face conversation in Johnson's office, Respondent and Johnson again discussed the revocation, and Respondent asked her if she had heard anything about his second Off Duty Employment Application (the application to teach at Queensborough Community College). Johnson could not recall the exact date or time of this conversation.

At some point after September 17, 2010, Johnson received the memorandum regarding the disapproval of Respondent's second Off Duty Employment Application. This time she notified Respondent of the memorandum in person. During a conversation in her office, Respondent became upset and told Johnson that "he can't survive on just [his Department] job." Nobody else was present during the conversation, and Johnson could not recall when it took place.

On cross-examination, Johnson reiterated that she spoke with Respondent once on the telephone and twice in person about the status of his off-duty employment applications. The telephone call, which occurred before the in-person conversations, took place at some point after September 15 but before she went on vacation to Saint Martin on Columbus Day weekend. [Columbus Day was October 11 of that year.]

She did not recall speaking to Respondent on the telephone about his teaching application. During the in-person conversation about the first application, Johnson had not yet received the memorandum concerning the disapproval of the second application. Records show that Johnson worked the first platoon on September 17 (the date that the memorandum concerning the disapproval of Respondent's teaching application was generated). She signed out at 0750 hours that day and had no recollection of receiving the memorandum before then. Because September 18 and 19 were her regularly

scheduled days off, she did not return to the command until the evening of September 20, which was Respondent's regularly scheduled day off. She was assigned as duty inspector on September 21. Johnson noted, however, that her tour and Respondent's tour overlapped that day by 15 minutes. As for September 22, Respondent probably attended a district cabinet meeting on Johnson's behalf, and he worked the United Nations General Assembly detail the following day. She did not recall being out of work during the latter part of the month. [The parties stipulated that, according to records, the only time that Johnson and Respondent could have been together in the command between September 17 and the end of the month was during the brief overlap of their tours on September 21.]

Johnson agreed that she and Respondent did not have the best of relationships and that they kept their relationship strictly professional. She denied ever telling a former co-worker that she hated Respondent. She explained that she would never tell anybody that she hated another person.

Her telephone conversation with Chu about the matter had a casual tone and probably lasted just a few minutes.

On redirect examination, she testified that she attends church within the confines of the 113 Precinct, and she normally stops in at the command before and after services. She may have gone to the command on Sunday, September 19 (her regularly scheduled day off), but she could not be certain of it, as she did not sign in on that day. Johnson gets to church at 0630 hours and stays there until approximately 1400 hours. According to the Roll Call, Respondent worked until 0700 hours that day.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent, an 18-year member of the Department currently assigned to Patrol Borough Manhattan North, was the executive officer of the 113 Precinct between June 2008 and the end of September 2010. He first became authorized to engage in off-duty employment as an attorney around 2000. Prior to the current case, the Department never revoked this authorization. It is his understanding that the revocation stemmed from the media attention concerning this case.

About his work as an attorney, Respondent explained that he did per diem work for various firms. He would call the firms in advance to see if there was any work available for times that he was free. Most of his work entailed appearing at the Workers' Compensation Board. He did not maintain a law office of his own, nor did he have a desk at Reckson Plaza.¹⁰ While a few of the law firms who utilized Respondent's services were located in Reckson Plaza, the plaza is a large office complex that contains many different kinds of businesses, including a post office, Federal Express, United Parcel Service, a real estate office, and a dentist.

About Specification No. 1, Respondent explained the lapse in his off-duty employment authorization as a clerical error. He did not realize that his application had expired, and he forgot to submit a renewal application. When he ultimately submitted the renewal application, it was approved.

¹⁰ This location is also described, in a stipulation, as Rex Court.

About Specification No. 7, he conceded that there were times that he used a Department vehicle to tend to needs at home. He explained that at the time he had four young children, and his wife was sick due to [REDACTED] that she developed during pregnancy. There were a few occasions that he would get a frantic call at work telling him that he was needed at home. It was on those occasions that he used a Department car to drive home. [Respondent's Exhibit (RX) A is a note from Respondent's wife's doctor, detailing the extent of his wife's medical condition.]

With regard to all specifications dealing with November 2, 2007, Respondent explained that he went home that day to change a flat tire on his wife's car because he could not leave his wife without a functioning vehicle. He went back to work right after changing the tire. During that period, he was working all hours of the day on a big investigation and "was putting the needs of the Department first and also trying to balance the needs of [his] home." [DX 24 is a copy of the Command Log for November 2, 2007, showing that Respondent was present for duty at 1030 hours.]

As for specifications dealing with January 3, 2008, he explained that he was still balancing his family issues. On that day, he signed in at work at 1300 hours, went home from 1600 hours to 1800 hours to assist his wife with the children, and then returned to work until 0045 hours. In total, his work day lasted 11 hours and 45 minutes. This means that even after subtracting the two hours that he was at home, he still worked in excess of his regularly-scheduled eight-hour tour. [RX C is the Command Log for January 3, 2008, confirming that Respondent signed in at 1300 hours and signed out at 0045 hours the next day.]

Respondent testified that on January 17, 2008, he dropped off files at Reckson Plaza during the early portion of the day. During the afternoon, he received a message that he had to participate in a conference call for Patrol Borough Queens South executives. At approximately 1600 hours, while still inside Reckson Plaza, he called the borough from his Department cell phone. He explained that when somebody enters or leaves one of these conference calls, the caller's name is announced to all the other participants on the call. This announcement overrides whoever is speaking at the time. Because Respondent had a bad connection on his cell phone, and he did not want a dropped call to result in an embarrassing and interrupting announcement, he ended the call on his cell phone and decided to enter the conference call using a Reckson Plaza hallway landline. The borough chief, the inspector, and the borough's executives were on the call. He did not recall the specifics of that particular call, but those types of calls typically last upwards of an hour and a half. After the call, he had to drive his elderly aunt from a Manhattan hospital to her home in the Bronx. She was in the hospital visiting Respondent's uncle, a retired Chief of Personnel, who was suffering with Person C [REDACTED]. On that day, Respondent made a Command Log entry explaining his actions.

Respondent contended that he was not off post on January 25, 2008. He signed in the Command Log at 1055 hours for an 1100 by 1900 tour. He remained at work the entire day. Similarly, Respondent contended that he was not off post on March 28, 2008. He signed in the Command Log at 1100 hours and signed out at 1920 hours. At no point did he conduct business at the Workers' Compensation Board during his tour that day. In fact, at no point did Respondent ever work as an attorney while on Department time.

Respondent conducted work at the Workers' Compensation Board prior to his tour on April 11, 2008. He was scheduled to appear before the board at 0900 hours that day for the case of Person B [The transcript for the Person B case indicates that it could not have lasted more than five minutes.] After that proceeding, he handled another case (the case of Person D) at a conference with the judge. He explained that because the Workers' Compensation Board is such a high-volume tribunal, it is common practice for the sake of judicial economy for administrative matters to be dealt with in conference with judges in the morning and for the results to be put on the record by the judges at some point later in the day. After dealing with Person D Respondent reported for work, signing in the Command Log at 1130 hours for an 1130 by 1930 tour. [The parties stipulated that it would have taken him 14 minutes to drive from the Workers' Compensation Board to his command.]

Respondent testified that on July 22, 2008, he was scheduled to work a 1500 by 2300 tour, and he did some per diem attorney work during the morning. While he was dropping off files at Reckson Plaza, he received a telephone message from Lieutenant Person E stating that he needed to speak with Respondent about an urgent matter concerning another member of the service from the 113 Precinct. Respondent went to Person E residence to handle what he anticipated was a "duty captain job." He explained that he went straight from Reckson Plaza to Person E house, which was located just a couple of minutes away in the town of [REDACTED] instead of reporting to the 113 Precinct station house first and then driving back to [REDACTED] County because he thought it would be more prudent. The reason for Person E call was that his wife (a school teacher) had overheard the member's children telling a social worker that the

member was drinking again, had not been home in a few days, and was possibly in need of assistance. At no point did Respondent provide legal services for Person E. After leaving Person E's residence, Respondent went to his command and spoke with Johnson about the matter. He also spoke with the Medical Division and learned that the Medical Division was already aware of that member's drinking problem. The following week the member was sent to an alcohol treatment program.

On June 3, 2008, Respondent handled a case before the Workers' Compensation Board at 1300 hours. The case ended at 1335 or 1340 hours, and Respondent went straight to his command. He was scheduled to work a 1500 by 2300 tour, and he signed in the Command Log at 1415 hours. He changed his tour to 1415 by 2215 hours. He subsequently took a Department car toward [REDACTED] Hospital where his uncle had been taken to the emergency room. Before he reached Manhattan, he was notified that his uncle had been admitted to the hospital. At that point, Respondent may have "gotten caught up on [a Department-related] job." He returned to the station house at 1730 or 1800 hours.

Because November 6, 2007, was Election Day, most officers worked election posts that day and Respondent's assignment was to be the "extra helping hands in [Patrol Borough Queens South] with regards to any administrative functions having to do with the elections." He started his tour at 0900 hours. His tour was scheduled to end at 1700 hours, but he ended up staying at work until 2300 hours. [RX B is the Command Log for November 6, 2007, confirming that Respondent signed in at 0900 hours and signed out at 2300 hours.] Although Respondent was entitled to six hours of overtime at a rate of time-and-a-half, he opted instead to count the extra hours he worked that day as the first

six hours of a double tour (which would have been his tour for November 7). He proceeded to submit a Leave of Absence Report to take lost time for the period between 2300 hours and 0100 hours (the final hours of his double tour). Respondent explained that he shortchanged himself out of overtime compensation in the best interest of the Department.

After working the double tour, Respondent did not have to report to work at all on November 7, 2007. He spent the day at home with his family. When it came time to submit his Night Shift Differential Request for the month, however, he erroneously indicated that he worked a 1700 by 2300 tour on that day. He explained that he did this because after working the 0900 by 1700 tour on November 6, the next six hours that he worked did in fact count as his tour for November 7. Furthermore, because he did not count those hours as overtime, he was entitled to night shift differential for it. While this may have been an unconventional way to document those hours, there was, he said, no other way to do it. When asked why he did not just put in for overtime on November 6 and then list himself as off duty on November 7, Respondent replied, "I thought I was acting in the best interest of the Department by not taking the overtime, because it looks funny that I am submitting overtime on a Tuesday and then taking off on Wednesday. . . . I was looking to be a team player and not do it that way." [DX 25 is a copy of the Command Log for November 7, 2007.]

Although Respondent never received documentation of approval regarding his application to teach at Queensborough Community College, he believed that he had approval since he listed his teaching position on his other Off Duty Employment Application (the one for continuing work as a per diem lawyer). He conceded that he

taught within three hours of his start of tour on May 31, June 1, and June 2, 2011. He explained that he was "a little bit unsure of what the three hour rule actually means," and he did not see any harm in starting his tour directly after teaching.

According to Respondent, in a very brief telephone call Johnson informed him that his authorization to work as an attorney had been revoked. He never discussed his off-duty employment authorization with her in person, nor did they ever discuss his employment at Queensborough Community College. Respondent and Johnson worked together between June 2008 and September 2010. Their relationship began fairly well, but it started to deteriorate after a couple of months. By the end, they were not even talking to each other.

While Respondent was on vacation leave on July 5, 2011, he reported for an official Department interview. He did this on his own time and adjusted his family's vacation plans for the purpose of moving this case forward.

On cross-examination, Respondent testified that he was admitted to practice law sometime after 1999. Because the files that he works on generally belong to other peoples' firms, he does not keep records of his workers' compensation cases. He generally got paid per case instead of by the hour.

Although Respondent left his post to change a flat tire in Nassau County on November 2, 2007, he disagreed that he failed to supervise the subordinates under his command during that period. He explained that he had his Department cell phone on him, he told his subordinates where he was going to be, and his subordinates also had his home telephone number. He gets calls from his subordinates at all hours of the day, and changing a flat tire would not prevent him from supervising. He did not notify the

Department that he was leaving his command and the borough, as he was concerned about changing the tire for his sick wife. He did not submit a Leave of Absence Report for the period that he was away.

Respondent indicated on his Night Shift Differential Request that he worked a 1645 by 0045 tour on January 3, 2008. He conceded that he was off post while he was tending to his family in [REDACTED] County between 1620 and 1820 hours. He again testified that he did not fail to supervise his subordinates during that period. He explained that he had absolutely no problem supervising, as his subordinates could have contacted him by email or telephone. He did not notify the Operations Division that he was leaving the city.

Respondent reiterated that he was on a conference call with borough executives on January 17, 2008. There were probably 30 or 40 participants on the call. Although he took the call on a landline in a Reckson Plaza public area, Respondent was not concerned about privacy since he spoke softly and was mostly listening. In a 1745 Command Log entry, he noted that he had been present for a conference call at 1600 hours that day. [Court Exhibit (CX) 3 is a copy of the relevant Command Log page. While Respondent indicated that he was present for the call, he did not indicate that he took the call in Nassau County.]

Respondent reiterated that he arrived at his command at 1055 hours on January 25, 2008. He contended that Bailey's testimony that he did not arrive until after 1120 hours on that day was inaccurate. Respondent similarly reiterated that he was present for duty at 1415 hours on June 3, 2008, and he contended that Bailey's testimony that he was observed at the Workers' Compensation Board at 1415 hours was also inaccurate. After

Respondent's 1415 Command Log entry, the next entry made that day was at 1443 hours. Respondent has never asked someone at the desk to "save a line" for him in the log.

Before Respondent arrived at Person E house on July 22, 2008, he did not know what the subject matter of their conversation was going to be. Person E did not want to discuss the issue on the telephone because he did not want to reveal that it involved his wife overhearing a conversation at the school district. Respondent did not recall if he notified the borough or the Operations Division before responding to Person E residence. He believed he notified the desk at the 113 Precinct. He was assigned to work a 1500 by 2300 tour that day. At 1730 hours, he signed in the Command Log (DX 23) indicating that he had started his tour from another location. [DX 23 is a copy of the relevant Command Log pages.]

Respondent submitted his off-duty application to teach at Queensborough Community College on August 16, 2010, and Johnson approved it the following day. He never received from the Employee Management Division the approved yellow copy of the application. He had applied for off-duty employment numerous times in the past, and he had never before received a copy of his application back from the Employee Management Division. He explained that he did not understand at the time the role that the Employee Management Division played in the process. He believed that "for the most part" his application was approved once it was signed by Johnson. Although the bottom of the application has a section to be completed by the Employee Management Division, Respondent stated that he was "really unaware of what the bottom of this form, that it went to this extent."

On redirect examination, Respondent described Reckson Plaza as "two office towers connected by three floors of mezzanines with an ice skating rink, stores, dry cleaners, banks, gyms." There is also a restaurant. On November 7, 2007, he might have been present there to use the gym, eat, or use the parking facility.

Respondent was assigned as the Patrol Borough Queens South duty captain on July 22, 2008. He never entered Person E home that day. He stayed outside by his car. He and Person E did not discuss anything other than Department business.

On further examination, Respondent testified that his subordinates had his home telephone number, private cell number, Department cell number, beeper number, and Department and private email addresses. Some of them even had his wife's phone number. If anybody needed this contact information, it was always posted on a dry erase board in his office. There was, therefore, absolutely no time that his subordinates could not get in contact with him. He often received calls at 0200 or 0300 hours.

STIPULATION

The parties entered into a stipulation regarding the average travel time between some locations relevant to this case based on internet mapping services, (CX 1). The parties stipulated that the average travel time from Respondent's home to the Queens South Task Force is 27 minutes. That the average travel time from the law offices at Rex Court to Queens South Task Force is 18 minutes. That the average travel time from the Workers' Compensation Board to Queens South Task Force is 14 minutes and that the average travel time from the Workers' Compensation Board to the 113 Precinct is 18 minutes.

FINDINGS AND ANALYSIS

This case, with its many and sometimes redundant specifications and its amended and re-amended charges, poses unique issues of organization in any endeavor to sort out the facts.¹¹ The case is also unique in that Specifications 11 through 15 were added as the result of an official Department interview conducted after the trial began.

Several of the specifications reference the same dates. In the following analysis of each specification, each of the dates will be examined as it relates to that specific specification.

Specification No. 1

This specification charges Respondent with unauthorized off-duty employment as an attorney. On the third day of the trial the Assistant Department Advocate (hereinafter Advocate) amended this specification. Originally, this specification charged Respondent with unauthorized off-duty employment from November 7, 2007, to July 22, 2008, a period in excess of eight months. However, the Advocate informed the Court that further investigation revealed that Respondent, in fact, had an approved Off Duty Employment Application for most of that period. As a result, the specification was re-drafted to cover the period only from May 1, 2008, to July 22, 2008, a period about two and one-half months.

Respondent had permission to practice law both before and after the dates charged and this appears to have been some kind of administrative lapse as opposed to an intentional, long term, flouting of the rule, as it originally may have appeared to be.

¹¹ To address the specifications, as drawn, there are more than 40 separate findings.

Specification No. 2

This specification alleges that Respondent, while on duty, conducted personal business as an attorney. Six specific dates are referenced and need to be examined individually.

a. November 7, 2007 (as it relates to Specification No. 2)

With regard to this date, Bailey testified that Respondent was scheduled to work from 1700 hours to 0100 hours on November 8, 2007. Examining the time records, Bailey noted that Night Shift Differential Requests indicated that Respondent worked from 1700 to 2300 hours, taking lost time for the last two hours; however no Leave of Absence Report was submitted.

On November 7, 2007, Bailey commenced his surveillance of Respondent at 0840 hours, about eight hours before Respondent's tour. During the surveillance, they watched Respondent leave his home and go to what Bailey described as Respondent's law office. They saw him run out of the building at 1717 hours and return home. Bailey broke off the surveillance at 2030 hours with Respondent still at home. As a consequence, he was unable to say whether Respondent went to work after the surveillance ended.

The allegation that Respondent was conducting his law practice while on duty is apparently based on the claim that he was at what the Department contends is his law office from 1700 to 1717 hours. Respondent has denied that he has an office of his own. He said the location in question is a large mall called Reckson Plaza which has stores and services as well as offices. He acknowledged that that he did work per diem for other attorneys who had offices at that location.

Whether he worked for himself or someone else, the question posed by this specification relates to his doing legal work while he was supposed to be doing, and was paid to be doing, Department work. On the other hand, the fact that he did not have an office of his own and the location Reckson Plaza is a multipurpose facility with stores and other facilities, Respondent could have been anywhere in the location doing any number of things.

On the issue central to this specification there is absolutely no evidence as to what Respondent was doing for the 17 minutes from 1700 to 1717 hours. He may have doing legal work or he may have been shopping.

Respondent may have been absent without leave from his Department assignment (this date is also charged in Specification Nos. 3, 5, 8 & 10 and will be discussed in more detail later in this decision) but there is no evidence that he was engaged in the practice of law for those 17 minutes. Respondent is found Not Guilty of Specification No. 2 for this period of time.

b. January 17, 2008 (as it relates to Specification No. 2)

The next date in Specification No. 2 is January 17, 2008. Bailey testified that Respondent was scheduled for 1700 by 0100 hours tour according to the borough roll call. His Night Shift Differential Request showed his tour was from 1630 to 0030 hours. Respondent signed in the Command Log at 1745 hour as present for duty. Bailey observed Respondent leave his law office that day at 1805 hours and drive to work, arriving at 1830.

Respondent claims that he was required to participate in a Department conference call. This call commenced before his tour started and he was put on the call while at Reckson Plaza. He testified that, after the call, he went to his command. Again, there is no evidence that Respondent was actually practicing law during the time in question. Indeed, Respondent claims that he commenced his work for the Department at that time and at that location because he was required to participate in the call when it came. Whether Respondent engaged in other misconduct on this date will be dealt with later in this decision but as to Specification No. 2, the Department has not established that he was practicing law while on duty and the Respondent is found Not Guilty with regard to that date.

c. March 28, 2008 (as it relates to Specification No. 2)

The evidence for this date is circumstantial, that is, there is no direct, eyewitness testimony. The claim is that Respondent appeared as an attorney before the Workers' Compensation Board. Bailey testified that according to Respondent's Night Shift Differential Request, he worked from 1100 to 1900 hours that day. Testimony from a court reporter, Lehman, was that he appeared on a case that was called at 1047 hours and concluded at 1050 hours. There was also testimony from court reporter Jordan who said that Respondent handled a case from 1054 to 1058 hours that day. The conclusion, therefore, was that Respondent could not have been at work at 1100 hours if he finished the call of his last case in Nassau County two minutes earlier. No specific time was charged as to how late Respondent allegedly was for work that day.

The problem with the evidence here is that neither Lehman nor Jordan had any specific recollection of the day. Lehman was relying on the time stamp in her stenographic machine to fix the time that the case was called. However on cross-examination, it was learned that, originally, the time she gave for this calendar call was an hour off because she failed to re-set it for daylight savings time. It was also learned that the time on that machine is set manually and could have been incorrect. As a result, there is no reliable evidence as to when the case Lehman recorded actually was called.

A similar problem exists with regard to the case recorded by Jordan. Her records indicated that the case was called at 2254 hours ending at 2258 in military time. On examination, she acknowledged that this would have occurred at night when she does not work. She then claimed a twelve-hour mistake, yet she was unable to explain how that happened or how she managed to later make an entry regarding the case using the 2200 hours numbers even though she claimed to know military time.

Jordan also testified that time was never recorded on transcripts prior to approximately a year before this trial.¹² She said that now it is recorded. It is clear that, in 2008, recording the time was not a critical issue. It was available, for reference in the computerized stenographic machines, but there was no great care taken to see that these, which were set manually, were accurate. This is evinced by the fact that both reporters who testified about this day, Jordan and Lehman, had inaccurate times on their machines. There was an obvious potential for error.

There was no testimony about surveillance on this date. It is clear enough that Respondent appeared before the board that morning but the Department cannot say with

¹² This was apparently about the time this Department started making inquiries into this matter and it would not be surprising if that were the reason the board now lists the times.

reasonable and reliable accuracy when Respondent concluded his business there. Nor can the Department say when Respondent actually arrived at work that day. It should be noted that the parties stipulated that the travel time to Respondent's work locations from the hearing room was less than half an hour. These cases could handily have been called and completed with Respondent having sufficient time to arrive at work as he claimed. As a consequence, the Department has failed to provide adequate and substantial circumstantial evidence that Respondent was late for work that day. Consequently, he is found Not Guilty with respect to having engaged in his private law practice while on duty for that day.

d. April 11, 2008 (as it relates to Specification No. 2)

This is another day in which it is claimed that Respondent appeared as an attorney at the Workers' Compensation Board. Once again, there are no eyewitnesses and the evidence is circumstantial and based upon the records kept by the court reporter for that tribunal. As with the previous date, the court reporter had no personal recollection of events and was relying entirely on the records she produced.

According to Bailey, Respondent's Night Shift Differential Request indicated that he worked an 1130 to 1930 tour for the Department.

Two court reporters from the Workers' Compensation Board testified regarding this date; DeMatteo and Sellers. DeMatteo said that Respondent represented two claimants that day, Person B and Person C. The Person C case concluded at 1018 hours. She was not asked for and did not give a time for the call of the Person B case.

Respondent was not due in for work until more than an hour later so there is no reason to believe that that case made him late for work.

The Workers' Compensation Board calendar also showed that Respondent represented a client, Person D on two cases that were scheduled for 1330 hours that day. The court reporter for those cases, Sellers, said her stenographic machine indicated that they were actually called after 1400 hours. The Department contends that this is proof that he either remained at the board throughout the day or left his command to cover this case.

Respondent testified that he handled the Person D case in the morning at a conference with the judge. He testified that the cases were not put on the record at that time. He said he then left and went to his command where he reported for duty on time. He testified that because the Workers' Compensation Board is a high-volume tribunal, it is not uncommon to discuss a case with the judge and opposing counsel and then have the result put on the record, by the judge, outside the presence of counsel, at a later time.

Court reporters who testified confirmed that this sometimes happened at the board. The transcript of the Person D cases is in evidence (DX 11). It is a two page exhibit. The first page is a cover page which lists the case name and the attorneys. Respondent is listed. The second page is the actual transcript. It notes that there was an off-the-record discussion. Then the judge, and only the judge, spoke and made a very short statement (less than 30 words). The transcript is not only different than the other transcripts put in evidence in that the attorneys do not speak, but it is also different in context. The judge does not speak in a conversational manner but sounds like he is

summing up action on the case. This transcript is consistent with Respondent's testimony.

This transcript provides insufficient or reliable evidence to establish that Respondent was present in person for the call of the Person D cases into the record in the afternoon. Indeed, the transcript appears to confirm what Respondent said, that he was not present when the case was actually called on the record and that the transcript merely summarized an earlier conversation.

The Department has again failed to provide adequate and substantial evidence that Respondent was at the Workers' Compensation Board conducting legal work when he was supposed to be performing work with this Department. Consequently, he is found Not Guilty with respect to having engaged in his private law practice while on duty for that day.

e. June 3, 2008 (as it relates to Specification No. 2)

With regard to this date, Respondent is charged with appearing at the Workers' Compensation Board and conducting business as an attorney in conflict with his responsibilities to the Department. In this instance, there is a witness. Bailey claimed that he conducted surveillance on Respondent that day and observed him leave the Workers' Compensation Board at 1415 hours. Bailey also testified that, according to Respondent's Night Shift Differential Request, he worked that day from 1415 to 2215 hours. Respondent, he said, was also signed in the Command Log at 1415 hours.

The problem with this specification as it pertains to this date is technical. If one accepts that Respondent left the Workers' Compensation Board at 1415 hours, then he

was not working as an attorney while he was signed in at that same time; 1415 hours. He certainly may have been in violation of Department rules and that issue will be explored as this date and this incident appear again in Specification Nos. 4, 5 and 9. However, given the way these charges parse each date and each incident into discrete (and sometimes repetitive) violations, it is necessary to carefully measure the language of the specification against the facts. The facts claimed by the Department do not establish the specific violation alleged and thus as to Specification No. 2, Respondent is found Not Guilty with respect to this date.

f. July 22, 2008 (as it relates to Specification No. 2)

This is the last date charged under Specification No. 2. With regard to July 22, 2008, Bailey stated that, as a result of his ongoing surveillance of Respondent, he observed that Respondent went to the Nassau County residence of Lieutenant Person E who at the time, according to Bailey, was on terminal leave. Respondent claimed that Person E was an active duty lieutenant in the 113 Precinct who was on sick leave at the time. Person E had called him and asked to speak to him in person. As Person E was out on sick leave at the time, Respondent went to his home as Person E did not want leave that location and violate sick leave policies.

Respondent testified that Person E told him about a conversation overheard by Person E wife, a school teacher. In that conversation, the child of another member of the service had been heard making comments which indicated that member had a serious alcohol-abuse problem. As a result, Respondent had a conversation with the Medical Division and learned that they were aware of and dealing with that member's problem.

As it pertains to this specification, there is absolutely no testimony or any evidence at all to suggest that Respondent was engaged in the practice of law at the time of his visit to Person E. During closing argument, after questioning by the Court as to what evidence there was to indicate that this conversation had anything to do with the practice of law, the Advocate moved to dismiss this date from the specification.

Specification No. 3

This specification alleges that Respondent “failed to supervise officers under his command in that [he] was conducting personal business while on duty.” Six dates are listed as comprising this specification.

Before examining the individual dates, it is necessary to address the manner in which this charge is drafted. There are two aspects of the operative sentence of this specification. One is that he was “conducting personal business while on duty” and the other is that he “failed to supervise officers under his command.”

Not a scintilla of evidence was produced during this trial to establish that officers working under Respondent’s command were not supervised. There is no evidence of enforcement or administrative work that was unattended to or that subordinates ran amok during this period of time.

Certainly, a patrol sergeant who leaves his command during his tour can be charged with failing to supervise by dint of his failing to be physically present and bodily available to supervise. A captain is not a super-sized sergeant whose bodily presence is always necessary to provide supervision. A captain is a member of the managerial ranks and has a different role. For that reason a captain, particularly a captain serving as

executive officer of a precinct or one commanding an enforcement unit, positions Respondent had during the period of time in these charges, is expected to provide supervision and guidance during his or her tour of duty and well beyond that. Absolutely no evidence has been provided to establish that Respondent failed to do this while on duty or off-duty.

Respondent testified that he posted his various phone numbers in the command so that he could be reached at all hours of the day or night. He also gave uncontested testimony that he answered phone calls at all hours of the day or night and dealt with issues related to his Departmental responsibilities. No evidence has been offered to rebut this claim, which is credible because the positions he held require that kind of responsiveness.

On the other hand, managerial employees, like their subordinates, have tours of duty and are expected to be physically present and at work for a certain number of hours at a minimum.

Consequently, Respondent is found Not Guilty with regard to each date in this specification on the issue of "failure to supervise." In analyzing this specification, this Court will consider only the issue of "conducting personal business while on duty" to determine if Respondent is partially guilty of this specification with regard to that date.

a. November 2, 2007 (as it relates to Specification No. 3)

Respondent admits that on this date he received a call from his wife indicating that her car had a flat tire that needed to be fixed. Respondent has offered testimony in

mitigation which will be discussed in more detail later in this report. Based on Respondent's admission, he is found Guilty with regard to this date.

As with so many things in this case, it should be noted that there is a disagreement as to the facts. Respondent recalled that he was at work, received a call from his wife, and as a result of that call went home to address the flat tire. The Department argued that this incident occurred before he went to work because he was signed in at 1030 hours but was seen by Bailey changing the tire at 1015 hours.

Either way, Respondent acknowledges changing the tire while signed in to work with the Department. He cited as mitigation the very difficult situation with his wife's health and the need to care for four small children and that will be addressed in more detail later in this decision.

b. November 7, 2007 (as it relates to Specification No. 3)

This is the date, previously discussed, on which Bailey observed Respondent leave Reckson Plaza, running to his car at 1717 hours. He then observed Respondent go home, where Respondent remained until the surveillance broke off at 2030 hours.

Respondent's defense to this is unique. He explained that the day before, Tuesday, November 6, 2007, was Election Day. Respondent explained that on that day all plainclothes officers are assigned to uniform duty related to the election. He noted that in the Command Log for November 6, 2007, he signed in at 0900 hours leaving at 2300 hours. He explained that he would have been entitled to overtime that day but did not apply for it. Instead, he took the following day, November 7, 2007, off entirely but put in for the remaining hours he worked on November 6, 2007, as though he had worked

them on November 7, 2007. Consequently, his Night Shift Differential Request indicated that he worked from 0900 to 1700 hours on November 6, 2007, and a tour of 1700 to 2300 hours on November 7, 2007, with 2 hours of lost time (this is yet another issue which will be discussed in conjunction with Specification No. 8 later in this decision).

There is really no reason not to accept Respondent's representation about what occurred here. This Court takes judicial notice of the fact that November 6, 2007, was the Tuesday after the first Monday in that month in that year and hence was Election Day as Respondent asserted. Further, the Court accepts as credible Respondent's testimony that he worked a very long shift that day as noted in the Command Log (RX B). The Court does not accept that he did this to save the Department money as he claimed but to obtain cash instead of time.¹³ Nonetheless, he apparently did work the number of hours listed for the two days on his Night Shift Differential Request. In this sense, he did not "steal time."

Because the Night Shift Differential Request was the operative document with regard to how the Respondent was paid, it is reasonable for the Department to assert that he was supposed to be on duty when he listed himself as such on that form. Consequently, Respondent is found Guilty of this specification with regard to November 7, 2007.

c. January 3, 2008 (as it relates to Specification No. 3)

Respondent has entered a plea of guilty with regard to this date but, once again, there are different versions of the facts that need to be addressed. Respondent's Night

¹³ See Collective Bargaining Agreement between the City of New York and the Captain's Endowment Association.

Shift Differential Request for this date indicates that he worked from 1645 to 0045 hours. Surveillance of Respondent indicated that he left home at 1800 hours. The investigators "lost" Respondent at 1820 hours. At 2000 hours, when investigators went to the command, they found his vehicle there. The Department claims he was missing from duty for three hours and 40 minutes (see Specification No. 5), while Respondent claims the time lost was actually less.

It should be noted that there is no testimony about this date and that the times and circumstances come from representations made by the attorneys. This omission apparently occurred because Respondent indicated that he was going to plead guilty and offer mitigating circumstances (his wife's health issues) regarding this date. It seems obvious that Respondent arrived at the command prior to 2000 hours but there is no way of knowing how much before 2000 he did arrive. Of course, this a problem of the Respondent's making and clearly he was not on post when he claimed to have been. The guilty plea for this date is noted.

d. January 17, 2008 (as it relates to Specification No. 3)

On this date, Respondent claims that he was required to participate in a conference call from the command. This call, he testified, may have had as many as 30 participants. Because he was notified of the call while he was at Reckson Plaza, he had to take the call there. He stated that if someone leaves the conference call, an announcement is made that overrides the speaker. This not only interrupts the discussion but is an embarrassment. To avoid having a dropped call on his cell phone, he used a land line at one of the law offices in the plaza.

During his closing argument, the Advocate in this case claimed that the call never occurred. No evidence was provided to support this claim and the Court notes that Respondent testified credibly on this issue. Respondent's claim that he was on a conference call that date was hardly a recent fabrication as it was noted in the Command Log.

More significantly, a review of Bailey's testimony indicates that Bailey confirmed that such a conference call involving the borough occurred; only Bailey said it lasted two minutes, based, apparently, on Bailey's review of Respondent's cell phone records. The preliminaries of a conference call would last more than two minutes so that two-minute call was not the conference call itself. On the other hand, that two-minute call does tend to confirm that preparations for a true conference call were being made as Respondent said. Respondent's explanation for not making the call on his cell phone makes sense. It is obvious that Bailey was unfamiliar with conference calls conducted at the executive level of command. He acknowledged in his testimony that he was unfamiliar with the 800 number for such conference calls and the PIN process for signing in.

Bailey testified that Respondent had stated at his original official Department interview that the conference call had been made on a phone in an attorney's office.¹⁴ If the Department believed that no conference call occurred, it would have been easy for the Department to establish that well before the commencement of the trial. Yet, no such evidence was forthcoming.

Remarkably, Bailey conceded on cross-examination that he had never checked with Patrol Borough Queens South to see if a conference call had occurred that day and that he simply did not know if such a call had been made. Bailey testified on July 22,

¹⁴ This would have had to have occurred before the original charges were served in March 2009).

2011. This trial concluded in December 2011 and still no evidence was brought to this Court by the Department to challenge Respondent's assertion that he was on a very large Department-run conference call.

Respondent is found to be credible on this issue. Even though he was not at the command, he was working on mandated Department business and, consequently, he is found Not Guilty.

e. March 28, 2008 (as it relates to Specification No. 3)

The Department claimed that Respondent was at the Workers' Compensation Board on this date. It offered as proof circumstantial evidence based on the testimony and records of court reporters Lehman and Jordan. This matter was discussed in detail under Specification No. 2 where this Court determined that the evidence was insufficient to establish that Respondent was at the board when he claimed to be at work or even that he was at the board at a time which would have made him late for work. For the reasons set forth earlier in this decision, Respondent is found Not Guilty.

f. April 11, 2008 (as it relates to Specification No. 3)

The charge for this date is based on circumstantial evidence derived from the records of court reporters at the Workers' Compensation Board. It was discussed in detail in Specification No. 2. For the reasons set forth there, Respondent is found Not Guilty.

Specification No. 4

This specification alleges that on two dates, June 3, 2008, and July 22, 2008, Respondent failed "to supervise and perform his duties" in that he "was conducting personal business while on-duty and on July 22, 2008, was outside of both his command and the five boroughs."

a. June 3, 2008 (as it relates to Specification No. 4)

The issues presented in this specification regarding this date have been discussed before (see Specification No. 2). Surveillance of Respondent leaving the Worker's Compensation Board in Nassau County at the time he was signed in at his command establish to the satisfaction of this Court that Respondent was off-post (a more detailed discussion of this finding is found under Specification No. 5 with regard to this date).

As to the that portion of the specification which claims that he failed to supervise, Respondent is found Not Guilty, as there is no evidence of this (see discussion on this issue in Specification No. 3). Respondent is therefore found Guilty in Part of Specification No 4 as to this date.

b. July 22, 2008 (as it relates to Specification No. 4)

This is the day that Respondent visited the home of Lieutenant Person E. Respondent was the Duty Captain. He was assigned to work from 1500 hours according to Bailey. His Night Shift Differential Request indicated that he started work at 1500 hours.

Respondent was subject to surveillance that day which began at 0715 hours, many hours before he was scheduled to work. At some point during the day, he went to what Bailey described as his law office, which is apparently Reckson Plaza. He left that location and arrived at Person E house at 1500 hours. After one hour, he left and went to the command, where he arrived at 1625 hours.

Respondent gave a credible, work-related reason for going to Person E home to interview him. He stated that Person E was concerned about confidentiality, particularly with regard to his wife who had overhead the conversation at school indicating that another member of the command had an ongoing alcohol problem. As has been noted, Respondent is a captain and, as a result, is in a managerial position. He made a judgment call that the visit to Person E at his home in Nassau County was appropriate. There has been no showing that this decision violated any rule, regulation or order of the Department. Nor has there been any showing that it was such a bad decision as to constitute incompetence.

It is important to note that the Department initially alleged that this conversation was related to Respondent's off-duty legal practice. There is not a hint of evidence in the record to support that assertion and, as has been noted, the Department dismissed the charge based on that claim. In fact, the Department has offered no evidence at all to rebut Respondent's assertion that the discussion with Person E was about another member of service who, in fact, had an alcohol problem.¹⁵

Indeed, during the cross-examination of Department's own witness, Crisalli, it was established that the failure of Bailey to check on the veracity of Respondent's claims was surprising.

¹⁵ Bailey even conceded on cross-examination that he did not interview Person E

Respondent is found Not Guilty with respect this specification as to this date.

Specification No. 5

This specification alleges that Respondent was off-post on seven different dates.

a. November 2, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for three hours. Respondent has admitted that on this date he went home to fix his wife's flat tire. Respondent is found Guilty with regard to this date.

b. November 7, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for three hours and 30 minutes. As noted in regard to this date, Respondent created a fictional tour on his Night Shift Differential Request to address hours he worked the day before on Election Day. For the same reasons set forth in the discussion of this date in Specification No. 3, Respondent is found Guilty in this specification.

c. January 3, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for three hours and 40 minutes. As was discussed with respect to this date under Specification No. 3, Respondent admits being late for work but denies that he missed three hours and 40 minutes because he was at work before the surveillance team spotted his car parked at the precinct at 2000 hours. This Court agrees he had to have been there before the team came along and spotted his

car but there is no way of knowing how much earlier he was there. This is a problem of Respondent's own making. The Court accepts his guilty plea for this date and finds him Guilty as charged.

d. January 17, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for two hours. This is the date on which Respondent participated in a Department conference call. It has previously been discussed. Although he was not at a precinct, he was conducting Department business and, consequently, he was not off-post. Respondent is found Not Guilty.

e. January 25, 2008 (as it relates to Specification No. 5)

This is the first time this date appears in the charges and Respondent is charged with being off-post for 20 minutes. Bailey testified that he arrived at Respondent's home at 0900 hours and found that his personal vehicle was not there. Respondent left his home at 1020 hours in a Department vehicle. Bailey followed him but lost him. He and his partner, Chu, split up. Bailey went to the Respondent's "law office" while Chu went to the command. Bailey testified that Chu waited at the command until 1120 hours and then went to take a "personal." He returned at 1145 hours to find Respondent's Department vehicle there. Respondent was signed into the Command Log at 1055 hours. Although it is hearsay, the testimony is credible. The 20-minute figure is conservative under the circumstances and Respondent is found Guilty.

f. June 3, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for 30 minutes. This is the date that Bailey claimed to have observed Respondent leave the Workers' Compensation Board at 1415 hours while signed in at his command at that same time.

Regarding this date, the Department also provided testimony from court reporter DeMatteo that Respondent appeared that afternoon at the Workers' Compensation Board and represented a client before that tribunal completing that case at 1347 hours.

Respondent testified that he never worked as an attorney when he was supposed to be on duty. Based on the stipulations entered into by counsel, Respondent might have been able to get from the board to his command by the time he signed in at 1415 hours had he departed the board at 1347 hours. He is claiming, in effect, that Bailey is either mistaken or lying.

Normally, relying on the testimony of an investigator for this Department is something one would take for granted. Yet, in Bailey's case, there are reasons to question his mindset regarding Respondent and his skill as an investigator.

For instance, Bailey testified that his investigation commenced after receiving an anonymous note claiming that Respondent was practicing law while on duty. When he started his investigation, he ascertained that Respondent's regular tour of duty was from 1700 to 0100 hours, yet, he commenced his surveillances in the morning. The reason for this, he said, was to ascertain if Respondent was practicing law.

At that time, Respondent was indeed practicing law and, because he believed, correctly as it turns out, that he had permission to do so, he was practicing law openly and notoriously. Put another way, ascertaining that Respondent was practicing law

during the period of time that Bailey was investigating did not require the kind of extensive investigation Bailey mounted, as the information could easily have been obtained from public records. Indeed, Bailey testified that on November 7, 2007, he basically spent the whole day in the parking garage of Reckson Plaza. In fact, during his whole investigation he never went inside Reckson Plaza to see what was going on except for one trip to the lobby. Respondent, who clearly has been inside the plaza many times, testified that there are shops and other establishments located there. Despite numerous surveillances, Bailey had no idea about the existence of these establishments.

Bailey also is the investigator who ascertained that Respondent did not have permission for off-duty employment for the period from November 7, 2007, to July 22, 2008, leading to charges for those dates. This turned out to be in error, as Respondent did have off-duty employment authorization for most of that period, including and in particular, many of the days he specifically testified Respondent did not have such permission. Bailey apparently missed it and the original charges were drafted incorrectly.

Bailey is the investigator who never checked to see if a borough conference call occurred on January 17, 2008, and neglected to mention that when Respondent signed in that day Respondent had noted the phone call in the Command Log. He is the investigator who never checked to see if the borough recorded a call out on the day Respondent went to Person E house.¹⁶ The consequence of all of this is that Bailey's reliability is subject to question.

However, this whole problem is a creation of Respondent. He was certainly working as an attorney and appeared on a case at the Workers' Compensation Board

¹⁶ Department's witness, Crisalli made clear that Bailey failed to carry out several basic investigative steps with regard to that incident.

shortly before he had to report for work - certainly within three hours of his tour. Bailey's testimony was a straightforward observation and thus, on balance, his testimony meets the preponderance of the evidence test. Respondent is found Guilty.

g. July 22, 2008 (as it relates to Specification No. 5)

It is alleged that Respondent was off-post for one hour and 25 minutes. This is the date that Respondent, while working as the duty captain, was seen going out to Person E house in Nassau County. This specification has been discussed in detail under Specification Nos. 2 and 3. For the reasons set forth in Specification No. 3, Respondent is found Not Guilty with regard to this date.

Specification No. 6

This specification reads as follows:

Said Captain Matthew Travaglia, assigned to 113 Precinct, was off post on two (2) occasions; on March 28, 2008, Captain Travaglia was scheduled to perform an 11:00 am to 7:00 pm tour but was in Nassau County taking part in legal proceedings related to his law practice which started at approximately 10:47 am; on April 11, 2008, Captain Travaglia was scheduled to perform an 11:30 am to 7:30 pm tour but was in Nassau County taking part in two legal proceedings related to his law practice which started at approximately 10:04 am and 2:23 pm, and on both occasions he was outside of both his command and the five boroughs.

The issues related to these two dates, and the specific issue of whether Respondent can be proven to have practiced law at the times alleged, has been discussed previously with regard to Specification No. 2. This same conduct for both of these dates was also charged under Specification No. 3. As such, this specification is superfluous.

As noted in the discussion of this issue with regard to Specification No. 2, the proof here is circumstantial and there is not sufficient or substantial evidence to establish the facts alleged. Respondent is found Not Guilty.

Specification No. 7

This specification alleges that Respondent used a Department vehicle for personal transportation on five occasions between January 3, 2008, and July 9, 2008. No dates are mentioned in the specification and because Respondent indicated he was going to plead guilty and "mitigate," no evidence was presented regarding this specification. At the Court's request, the dates were entered into the record on consent, they are: January 3, 2008, January 11, 2008, January 25, 2008, April 4, 2008, and July 9, 2008.

As noted, Respondent has pled guilty to this specification but has offered evidence in mitigation. He asserts that his wife became quite ill during her pregnancy with their fourth child, suffering from a [REDACTED] He noted that there was a very tense delivery during which the life of both mother and child were in jeopardy. Both survived but his wife was weakened by the event and continued to have health issues. She returned home to care for four children under the age of six. He stated that he would sometimes get frantic calls from his wife and would have to run home to address those family needs. The truth of this dilemma was corroborated by a letter from his wife's physician (RX-A).¹⁷ Respondent asserted the use of the vehicle was to deal with several family emergencies that arose while he was on duty.

¹⁷ Indeed the medical letter sets forth a situation more dire than Respondent in his testimony. It notes that after the delivery Respondent's wife experienced many health difficulties. Sometime after that, she was subject to procedures regarding suspected [REDACTED]. This occurred at about the time the Department investigation started. It also mentions a re-hospitalization in April 2008, in the midst of the investigation,

It should be noted that Bailey, who was aware of Respondent's claim about his wife's health, testified at this trial that she did not have a health problem. This is interesting because his own observation of November 7, 2007, provides some confirmation of Respondent's testimony about having to race home to deal with crises arising from her health and child care issues. On that date, Bailey saw Respondent essentially run to his car at Reckson Plaza and go directly home.

Respondent's claims about his wife's health issues and family care issues are credible.

Specification No. 8

This specification alleges that on November 7, 2008, Respondent had taken two hours of lost time but failed to submit a Leave of Absence Report. Respondent originally pled guilty to this charge but, on further examination of his time records, he said he realized that he had worked a double tour the day before and felt he did not have to file a request for lost time. As a result he withdrew his guilty plea.

This date appears repeatedly in these charges and has been discussed in detail. The Respondent worked from 0900 to 2300 on Election Day, November 6, 2007. He did not work on November 7, 2007. On his Night Shift Differential Request, he broke the extended tour up into two days listing 0900 to 1700 hours as his tour on November 6, 2007, and 1700 to 2300 hours as his tour on November 7, 2007. Because the "tour" on November 7, 2007, was incomplete, he noted two hours of lost time on the Night Shift Differential Request. Of course, there was no lost time because the entire tour was a

for surgery related to the [REDACTED], as well as the need for an extended recovery period after that surgery.

fiction. As a result, there was no Leave of Absence Report for lost time to file.

Respondent is found Not Guilty of this Specification.

Specification No. 9

This specification alleges that while assigned to the 113 Precinct, Respondent received compensation for time that he was not entitled to on five separate dates each of which has been discussed previously.

a. November 2, 2007 (as it relates to Specification No. 9)

This is the date on which Respondent admits to changing a flat tire for his wife. The specification alleges that he received compensation for 10 minutes which was unearned. It is not clear how the Department came up with the 10 minute figure.¹⁸ Under the scenario set out by Respondent himself, in which he claims left work, changed the tire and then returned, the time would have had to have been much more. In any event, Respondent has admitted to receiving compensation on this date while he was changing the tire and he is found Guilty.

b. January 17, 2008 (as it relates to Specification No. 9)

This again is the date of the Department conference call that Respondent participated in. He did not receive compensation for time that he was not entitled to. Respondent is found Not Guilty.

¹⁸ The 10-minute figure is apparently another error in the charges. Under Specification No. 5, the Department claims three hours for this date.

c. January 25, 2008 (as it relates to Specification No. 9)

Respondent is charged with accepting compensation for 20 minutes which was unearned. The facts of this date are discussed in Specification No. 3 and for the reasons set forth, Respondent is found Guilty.

d. June 3, 2007 (as it relates to Specification No. 9)

Respondent is charged with accepting compensation for 30 minutes which was unearned. This is the date on which Bailey claimed he followed Respondent after leaving the Workers' Compensation Board. This date was discussed in Specification Nos. 2, 4 and 5. For the reasons previously set forth, Respondent is found Guilty.

e. July 22, 2008 (as it relates to Specification No. 9)

Respondent is charged with accepting compensation for 1 hour and 25 minutes which was unearned. This is the date on which Respondent visited Person E home in Nassau County. It is discussed in Specification Nos. 2, 4 and 5. For the reasons set forth previously, Respondent is found Not Guilty.

Specification No. 10

This specification alleges that while assigned to Patrol Borough Queens South on November 7, 2007, Respondent failed to sign in at the start of his tour and sign out at the end of his tour as required.

This date has been discussed over and over again in these charges. Respondent did not work on November 7, 2007, but for pay purposes, did list it on his Night Shift

Differential Request. He has been found guilty of being off-post as a result of this under Specification Nos. 3 and 5.

With regard to the Command Log, this Court finds that he correctly entered his full work period in that book on November 6, 2007. He was not present for duty on November 7, 2007. The Command Log records are perhaps the only accurate documents regarding these two days. In essence, this specification charges Respondent with not lying about being in the command when he was not there. Respondent is found Not Guilty of this specification.

Specification No.11

This specification charges Respondent with engaging in off-duty employment as an adjunct professor at Queensborough Community College from September 15, 2010, to June 30, 2011, without permission. Respondent pled guilty and mitigated, noting that the form submitted had been approved but later, at Headquarters, was revoked. He testified that he was not notified about that revocation.

Specification No. 12

This specification alleges that on three dates, May 31, 2011, June 1, 2011, and June 2, 2011, Respondent worked as an adjunct professor at Queensborough Community College within the three hours prior to his regular tour. Respondent has admitted to the conduct but essentially pled not guilty because he disagrees with the rule.

A fairly good reason for the rule can be found in the examination of Specification No. 2. In some of the instances examined regarding his off-duty employment as an

attorney, there is a question about whether he could have gotten to work given the approximate times that he finished his off-duty employment. A separation of three hours would remove that kind of problem. Indeed, given the plethora of charges in this case, it is surprising that there is no similar charge against Respondent for violating this three-hour rule with regard to his off-duty employment as an attorney.

As police work is the primary employment, and as permission is required from this Department to engage in secondary employment, this Department is well within its rights to set rules and the Respondent does not have the right to decide that it should not apply. Respondent is found Guilty.

Specifications 13, 14, and 15.

On July 5, 2011, after the commencement of this trial, Respondent was subject to an official Department interview on matters related to the charges that were then pending. These three charges result from that interview and were added to the original specifications and became part of this trial. Specification No. 13 claims that Respondent “provided false and or misleading statements to Department investigators when questioned about the facts and circumstances surrounding his off-duty employment applications and the disapproval or revocation of said applications.” Specification No. 14 alleges that these “false and misleading statements” impeded a Department investigation in that they necessitated that “further investigative steps be taken by Department investigators.”

Although the specifications themselves are ambiguous, the Advocate, at the direction of this Court, clarified the nature of these allegations. All three of the added

specifications refer to Respondent's off duty employment at Queensborough Community College, where he had been an adjunct professor. They do not refer to his off duty employment as an attorney.

Additionally, at the direction of this Court, relevant portions of the transcript of the official Department interview were identified by the Advocate and were placed in evidence as a Court Exhibit (CX 2). Five pages of transcript were provided by the Advocate, pages 15 through 17, as well as pages 25 and 26. On these pages, the Advocate highlighted several lines which comprise, he claimed, the misconduct. Of the highlighted lines, however it turns out that about half involve statements the Department agrees are truthful but were highlighted to demonstrate context.

The first actual alleged false statement is found on page 15. When asked if he had become aware that his off duty employment for Queensborough Community College had been disapproved, Respondent gave a lengthy answer and at the end of which he stated, "However, you know I mean, I was never formally told it was denied." The questioner then asked if he had become aware that it had been disapproved and revoked. Respondent replied, "Not for Queensborough, no." Respondent was then asked, "Are you saying that you never had a conversation with Crystal Johnson¹⁹ about it being disapproved?" The Respondent began to respond and was directed to give a yes or no answer, to which he said, "Not about Queensborough."

The next relevant statement was on page 26. Respondent was asked in pertinent part, "Are you stating that Crystal Johnson²⁰ never informed you that this off duty employment was disapproved?" To which Respondent replied, "Not for Queensborough

¹⁹ As in transcript, the person referred to was then Deputy Inspector, now Inspector Kristel Johnson.

²⁰ Again, as in the transcript. The person being referred to is Inspector Kristel Johnson.

College, no. I wish I was in receipt of that, I would never have been here I wouldn't have had problems like this. I never received a receipt back."

The portion of the transcript highlighted by the Advocate to provide "context" involved a question regarding the denial of Respondent's off-duty permission to practice law. The Respondent truthfully stated that he was aware that this had occurred.

The background for these questions is that Respondent had applied for approval for two types of off-duty employment. The first was to practice law and the second was to teach at Queensborough Community College. Both of these applications had been approved by then-Deputy Inspector Johnson, Respondent's commanding officer at the time, on two separate forms, each of which was dated August 17, 2010.

Both applications were denied when reviewed at Headquarters. A letter dated September 15, 2010, was sent to Johnson informing her that the approval for off-duty employment as an attorney had been revoked. A second letter, dated September 17, 2010, was sent to Johnson informing her that the application to teach at Queensborough Community College was disapproved. Each letter requested that Johnson inform Respondent about the action taken on his application.

Johnson testified clearly that she told Respondent about revocation of his permission to engage in off-duty employment as an attorney. She was also certain that she had told him about the second disapproval related to his employment at Queensborough Community College, however she could not remember the details of when and where it occurred. There is no indication that she made any notation or report about the conversation.

Specification No. 13 alleges a false statement and charges Respondent with a violation of Patrol Guide Procedure 203-10, which refers specifically to public contact. While this is obviously the wrong section, the appropriate provision, Patrol Guide Procedure 203-08, is mentioned in the body of the specification. That section of the Patrol Guide specifically addresses the issue of false statements. It advises members of the service that they face dismissal from the Department for making false statements, absent "exceptional circumstances."

The section also states: "The Department will not bring false statement charges in situations where, as opposed to creating a false description of events, the member of the Department merely pleads not guilty in a criminal matter, or merely denies a civil claim or an administrative charge of misconduct."

It would be hard to imagine a clearer case of a mere denial than the answers given by Respondent to the questions posed to him about whether Johnson told him that his application for off-duty employment at Queensborough Community College had been disapproved at Headquarters. On two occasions, he was specifically asked, and on two occasions, he specifically said he was not informed about Queensborough Community College. He provided nothing at all that could be construed as a "false description of events" beyond that denial.

Indeed, the specification itself misstates the facts. It alleges that he made false and misleading statements when he was questioned about the "facts and circumstances surrounding his off-duty employment application." Examining the transcript provided by the Advocate, there were no questions about "facts and circumstances." The questioner

asked a simple question and, at least in one instance, insisted on a yes or no answer.

There was no discussion.

This specification, at best, puts the Department in a one-on-one situation in which the recollection of Respondent is put up against the recollection of Johnson. It is, however, unnecessary to make a factual determination regarding whose memory of events is best.²¹ Even if his answer was false, Respondent merely denied that he was informed about the second letter disapproving his off-duty employment at Queensborough Community College. As such, Respondent is found Not Guilty of Specification No. 13.

Specification No. 14 alleges the same exact false and misleading answers and claims that they “impeded” the Department’s investigation. Investigators, it is claimed, hobbled by Respondent’s answers, were compelled to take “further investigative steps.” The testimony in this case is that one investigator, Chu, made one phone call to Johnson, who advised him that she indeed did tell Respondent about the rejection of his application regarding Queensborough Community College. To call this simple and somewhat ministerial act an investigation is surprising. He did not testify that he tried, let alone succeeded, in corroborating what Johnson told him, either through a witness or some documentation she might have prepared. All he succeeded in doing was to obtain a different and competing version of events.²²

²¹ Given Johnson’s lack of clear memory of the event or when it occurred, it is hardly clear that the Department could establish by a preponderance of the evidence that she advised Respondent of the denial of permission for off-duty employment at Queensborough Community College.

²² It is worth noting that on top of everything that can be said about this alleged investigation, Chu himself described the conversation not as a critical investigative step but as something done quite casually. In describing the call on his direct examination, Chu stated, “At a subsequent juncture I informally spoke with Inspector Kristel Johnson...” Later in his testimony, he reiterated the point by stating, “It was an informal conversation over the telephone with respect to any notification that she may have made to Captain Travaglia pertaining to his off-duty employment status.”

A somewhat similar situation arose in Disciplinary Case No. 82373/06 approved October 9, 2007. In that decision, the Court provided the following analysis:

It is difficult to understand how the Respondent's answers "impeded" the investigation. The Respondent's statements did not send this Department's investigators off on a wild goose chase or lead them down some garden path, nor did the Respondent block this Department's investigators or keep information from them. Moreover, the entire matter was resolved with a simple telephone call to clarify what was said. Certainly clarifications like this occur all the time. It is hard to understand how such a small, simple and routine act could be considered to be the result of an "impediment" thrown in their path by the Respondent.

Even if one were to consider the phone call an "investigative step," that does not mean that Respondent impeded the investigation. Investigations always require "investigative steps." In this case, Respondent did nothing to block, hinder or prevent the Department from taking what it considered to be an investigative step and, therefore, they were unimpeded. To view this situation otherwise would be take Respondent's right to merely deny something and turn it into an act of impeding.

For all of the above reasons, Respondent is found Not Guilty of Specification No. 14.²³

Specification No. 15

This specification reads as follows:

Captain Matthew Travaglia, after having been instructed by his Commanding Officer, Inspector Kristel Johnson, on or about September 15, 2010, and September 17, 2010, that

²³ For an example of "impeding an investigation" see, for instance, Disciplinary Case No. 86501/10 approved September 28, 2011, where a member of the service was dismissed in part for impeding. In that case, during an off-duty incident, Respondent impeded an investigation into his alleged misconduct by changing and discarding his clothing after learning that security officers were looking for someone matching his description.

his off-duty employment privileges were revoked and or disapproved, failed to comply in that he continued his off-duty employment.

It is remarkable in several respects, the first of which is that it does not tell us which off-duty employment it is addressing; this is a not an insignificant matter as there were two revocations in the period of time named. Perhaps it was intended to address his off-duty employment as an attorney. If that is the case, then it must be noted that there was no evidence presented to demonstrate that Respondent continued to work as an attorney after he was told not to do so by Johnson and, indeed, there seems to be no question that he stopped doing so.

If this specification is intended to address the adjunct professorship at Queensborough Community College, there is a significant factual issue as to whether Respondent was told about the revocation and serious doubt that it could be established that he was told about that revocation. This issue is discussed in detail in Specification No. 13 and is critically a part of Specification No. 14. More significantly, Respondent pled guilty to Specification No. 11, where he admitted to working in that capacity without approval. This specification as it relates to this issue is more than redundant. It is dismissed.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on August 30, 1993. Information from his personnel

record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Department Advocate has recommended that Respondent be dismissed from the Department. Respondent, who has attained the rank of captain, has a hitherto unblemished record and, judging from his evaluations and recognitions, has provided well-above average service to the Department. Under the Advocate's recommendation, Respondent would not only lose his job but, with roughly 18 and a half years of service, would lose his pension as well. This Court would not shy away from making such a recommendation if it were appropriate. But before accepting or rejecting the Department's recommendation, a careful examination is called for.

In his closing argument, the Advocate stated that no one was out to "get" Respondent. This seemed an odd and rather defensive statement to make, particularly given that no one seems to have accused him of that. On the other hand, the record in this case might give someone that impression.

There are some examples of rather surprising overreach. For instance, with regard to July 22, 2008, the day Respondent went out to see Person E in Nassau County, the Department charged Respondent under Specification No. 2, engaging in the practice of law while on duty. There was not a hint of evidence that this visit was connected to Respondent's law practice and the charge appears to have been based on surmise alone. Yet, this charge lingered until this Court pressed the Advocate during closing argument on how that allegation was established. It was at that point that the Advocate yielded and dismissed the charge. While that was good, it still leaves the question of how that charge was lodged in the first place (on March 16, 2009), and how it remained in the charges

until the very last moments of the trial (on December 7, 2011), when there was really no alternative but to concede that no *prima facie* case had been made.

There are many other things one could say about the charges in this case but, for the most part, this decision speaks for itself on these issues.²⁴ It is readily apparent that both the charges and the penalty recommended are inflated.

This is not to say that Respondent did not engage in misconduct – he did. It is however, necessary to put aside the excess and determine what actually has been established.

To help sort things out, this Court has prepared the following chart to outline its findings:

<u>Specification No. 1</u>	Plead Guilty
<u>Specification No. 2</u>	
November 7, 2007	Not Guilty
January 17, 2008	Not Guilty
March 28, 2008	Not Guilty
April 11, 2008	Not Guilty
June 3, 2008	Not Guilty
July 22, 2008	Dismissed
<u>Specification No.3</u>	
Failure to supervise Conducting personal Business on duty: November 2, 2007	Not Guilty as to all Dates
November 7, 2007	Plead Guilty
January 3, 2008	Guilty
January 17, 2008	Plead Guilty
March 28, 2008	Not Guilty
April 11, 2008	Not Guilty
<u>Specification No. 4</u>	
Failure to supervise Conducting personal	Not Guilty as to all Dates

²⁴ One minor, almost amusing, example of this overreach is found in Specification No. 10 which, rather perversely, charges Respondent with not a making a false entry in the Command Log.

Business on duty:	
June 3, 2008	Guilty
July 22, 2008	Not Guilty

<u>Specification No. 5</u>	
November 2, 2007	Plead Guilty
November 7, 2007	Guilty
January 3, 2008	Plead Guilty
January 17, 2008	Not Guilty
January 25, 2008	Guilty
June 3, 2008	Guilty
July 22, 2008	Not Guilty

<u>Specification No. 6</u>	
March 28, 2008	Not Guilty
April 11, 2008	Not Guilty

<u>Specification No. 7</u>	Plead Guilty
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<u>Specification No. 8</u>	Not Guilty
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<u>Specification No. 9</u>	
November 2, 2007	Plead Guilty
January 17, 2008	Not Guilty
January 25, 2008	Guilty
June 3, 2008	Guilty
July 22, 2008	Not Guilty

<u>Specification No. 10</u>	Not Guilty
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<u>Specification No. 11</u>	Plead Guilty
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<u>Specification No. 12</u>	Guilty
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<u>Specification No. 13</u>	Not Guilty
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<u>Specification No. 14</u>	Not Guilty
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<u>Specification No. 15</u>	Dismissed
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This quantitative analysis paints something of a picture of what the Advocate has charged and what has been established. In the end, the misconduct proven relates to

several dates which are repeated; November 2, 2007, November 7, 2007, January 3, 2008, January 25, 2007, and June 3, 2007. It should also be noted that, with regard to misuse of a Department vehicle, Specification No. 7 encompasses 5 different dates, two of which are repeated in other specifications.

Qualitatively, the most serious charges have not been proven. These include false statements, impeding an investigation and failure to supervise. Additionally, the allegations that Respondent was working as an attorney while on duty appear to have been significantly overblown. Of the six dates charged under Specification No. 2, none was proven and only on one date was it established that Respondent was late to his assignment with this Department as a result of his legal work during what appears to have been an investigation that went on for over a period of about eight months.

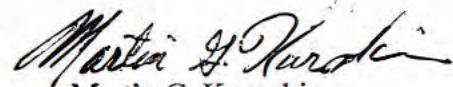
Respondent's conduct regarding November 6, 2007, and November 7, 2007, is difficult to fathom and this Court does not accept that he was motivated by a desire to save the Department money, but by a more practical desire to get cash rather than credit in time. On the other hand, there was no actual stealing of time and the 14 hours put in for over the two-day period reflected 14 hours actually worked, albeit, all on one day, not on two.

Respondent has engaged in misconduct. He also, as a captain and a leader, set a poor example for his subordinates. What he actually did, however, was far less egregious than claimed by the Department. Indeed, this Court, which has now handled hundreds of Department cases, cannot think of a similar case of misuse of time that has resulted in dismissal.

Respondent has also provided compelling information about family health and child care issues he was experiencing at the time of these incidents.²⁵ While these are neither offered nor accepted as an excuse, they provide context. Additionally, as many of these specifications involved alleged misuse of time, it worth noting that according to Department records, Respondent has not used a single sick day since 2002.

Considering all the factors regarding the misconduct Respondent engaged in, this Court recommends the loss of 30 vacation days as penalty.

Respectfully submitted,



Martin G. Karopkin
Deputy Commissioner Trials



²⁵ This issue is discussed in more detail in the analysis of Specification No. 7 and in the doctor's letter (RX A).

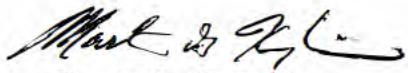
POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
CAPTAIN MATTHEW TRAVAGLIA
TAX REGISTRY NO. 903244
DISCIPLINARY CASE NO. 85116/09

Respondent's personnel file contains his last annual performance evaluation, dated January 2006, when he was rated 4.5 "Extremely Competent/Highly Competent." He received the same rating in 2000, 2001, and 2004. In 2002 and 2003 he received a rating of 4.0 "Highly Competent." He has been awarded 20 medals for Excellent Police Duty and two for Meritorious Police Duty. [REDACTED]

[REDACTED] Respondent
has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner Trials